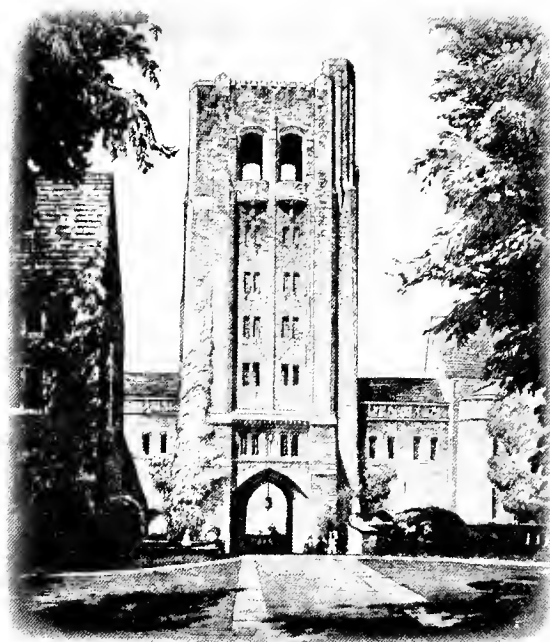






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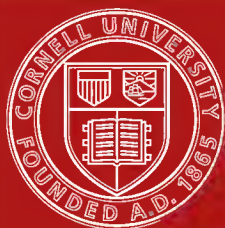
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AN INTRODUCTION
TO
PRACTICE
WITH
SPECIAL REFERENCE
TO THE
NEW YORK CODE OF CIVIL PROCEDURE

BY
GEORGE A. MILLER,
Professor of Law.

“LAWYER: *I understand nothing of all this. I am just going to plead your cause.*”

“CLIENT: *I wish to God you understood it better first.*”

—VOLTAIRE.

LESLIE J. TOMPKINS,
32 WAVERLY PLACE, NEW YORK CITY.
1903.

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AN APOLOGY BY WAY OF PREFACE.

The experience of the world, since the writer of the *fourth* gospel completed that work, would hardly seem to justify the opinion, with the expression of which he closes his narrative. He writes: "I suppose that even the world itself could not contain the books that should be written: Amen."

Certainly, the American lawyer of this day and generation has many books left on his table for examination, which, he concludes, might just as well not have been written, and even those which he feels he must get, make a pretty large item in his annual expenses.

Under such conditions, one who launches a new craft in the overgrown fleet of legal literature owes at least an explanation to the profession.

The plea, which the writer of this unassuming work interposes is one which is generally deemed sufficient, under any system of jurisprudence, whether rude or refined;—that of self-defense.

For many years past the writer has lectured in the law school of the New York University upon the subject of practice under the New York Code of Civil Procedure.

Sundry students who have attended these lectures, with the benevolent purpose of serving their associates, and, incidentally aiding themselves, have prepared and sold reports of these lectures, all more or less imperfect. The continuing annoyance of these inaccurate preparations has made it necessary to supersede them. Hence this volume. Its design is not to supply an Encyclopædia of Practice, nor a magazine of authorities, but to furnish to those with little or no knowledge of the machinery of the practice of the law, a practicable means of acquiring a general acquaintance with the subject.

The writer is aware of the ill repute in which the New York Code of Civil Procedure is held by a considerable part of the profession. In his opinion, the cause for this reputation is, in large measure, to be found in the circumstance that attorneys at the time of their admission, have had but little or no proper instruction in practice, and afterward acquire such knowledge as they get, painfully, and by a process of stumbling. Such experiences are likely to induce a disposition ever after to kick the stumbling block.

The Code was not written for students. Its authors assumed the existence of a profession having knowledge of an existing system of practice in which statutory changes were to be made.

For students, the Code is simply a collection of obscurities arranged in confusion. To them, as a subject of study, it is hopeless. To wander in its wilderness without a guide is to get lost. Yet the writer believes that it is practicable by efforts within ordinary abilities, properly assisted, to acquire a fair working knowledge of Code practice.

With this purpose in mind his lectures have been planned, and upon the plan of the lectures this book has been written.

With this explanation, its deficiencies, confessed in advance, may be excused.

NEW YORK UNIVERSITY, *December, 1903.*

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INTRODUCTORY.

1. The Code system of practice was introduced into New York about fifty years ago. Prior to that time the common-law courts conducted their business according to common-law practice, modified in some particulars by statute; while the Court of Chancery, with its separate jurisdiction, employed the distinctive machinery of equity practice.

The State Constitution of 1846 made provision for the appointment of a commission to revise, reform, simplify, and abridge the rules, practice, and proceedings of the *courts of record* of this State.

In the same article the system of separate law and equity tribunals was abolished and a substitution provided in its place of a "SUPREME COURT HAVING GENERAL JURISDICTION IN LAW AND EQUITY."

2. As the powers and jurisdictions of the courts of law and equity were thus amalgamated, the Code commissioners in constructing their statutory scheme of practice employed some of the devices of the former practice of each, rejecting such as in their judgment had outlived their usefulness, and adding here and there an invention or adaptation of their own.

The result of their labors was the CODE OF PROCEDURE of 1848 and 1849, a very much shorter statute than its successor, for the reason that it was not designed to cover *all* matters of procedure, but merely the practice in ordinary actions in courts of record.

3. The new and untried Code system necessarily resulted in a great deal of litigation. While the Code was small, the decisions as to what it meant were many. The statute itself was amended from year to year, and the decisions under it were gathered into series of "Practice Reports," while, out-

side the scope of the Code, were the statutory regulations concerning special proceedings and special jurisdictions.

4. A revision, amplification, and amendment of the original Code of Procedure resulted in the CODE OF CIVIL PROCEDURE, which became law in 1877-1880. For about a year the new Code was called the Code of Remedial Justice.

5. The Code of Civil Procedure, comprising twenty-three chapters, and about 3,500 sections, as amended by the Legislature from time to time, and interpreted and applied by the courts, furnishes the means of conducting legal proceedings in this State. It includes many more subjects than the original Code, and concerns not only practice in actions in courts of record, but practice in special proceedings and in special jurisdictions and minor courts.

6. For so large a field of study some plan of acquirement is necessary.

There are many sections of the Code concerning matters with which an attorney seldom or never is required to trouble himself; such, for instance, as the appointment, compensation, and direction of clerks, stenographers, and other assistants in the machine of justice. Other portions of the Code concern proceedings so rare and special in their nature that their use is seldom required. It is well enough to know that they are there and to postpone acquirement of details until they are needed.

With the practice in ordinary actions in courts of record, and the underlying principles it is essential that the attorney should be familiar; and the portions of the Code which relate to such practice will be selected for study.

7. There is a natural order for procedure in an action; the bringing of the parties into court; their statements of cause of action and defense; the trial, judgment, and its enforcement afford a reasonable division and succession of subjects.

CHAPTER I.

ORIGINAL PROCESS.

8. The principles of jurisdiction should be comprehended at the outset; namely, that a court's right to speak is strictly limited by law to cases in which

1. Either the *parties* to the action are before it; or the *thing* which is the subject of the action is within the territorial limits of the court's authority.

2. The sovereign power intrusts the court with authority to take cognizance of the *class* of cases in which falls the particular case as to which such authority is invoked.

3. The issues upon which judgment is asked are raised by the parties themselves. (*Cooper v. Reynolds*, 10 Wall. 308; *Pennoyer v. Neff*, 95 U. S. 714; *Reynolds v. Stockton*, 140 U. S. 254; *Akin v. Albany N. R. R. Co.*, 14 How. Pr. 337.)

9. "A civil action is commenced by the service of a summons." (Code C. P., § 416.)

It follows from the general principles of jurisdiction that a court has no right to take any step or make any direction affecting a defendant's rights until he is brought into court — that is, not until the action has been at least *commenced* against him.

When the action is commenced by the service of the summons and not until then may the court proceed to the exercise even of its incidental powers.

10. Were this principle absolutely without qualification, nothing could be done in an action until after service of a summons. There is therefore one very necessary and very limited exception provided for in section 416, namely:

"But from the time of the granting of a provisional remedy, the court acquires jurisdiction and has control of all the subsequent proceedings."

11. Provisional remedies.—It is necessary here to have some understanding of what these are. Under certain circumstances ordinary remedies would be unavailing. For some such extraordinary instances the Code provides what are termed “provisional remedies” — namely, Arrest, Injunction, Attachment, and Receivers. (*McCarthy v. McCarthy*, 13 Hun, 579.)

The qualification therefore as to the acquisition of jurisdiction permits the court to grant and have control of these provisional remedies. “Nevertheless jurisdiction thus acquired is *conditional, and liable to be divested*, in a case where the jurisdiction is made dependent, by a special provision of law, upon some act, to be done after the granting of the provisional remedy.”

That is, this grant of exceptional authority is made conditional and dependent upon the acquirement of jurisdiction in the regular way in the subsequent course of the proceedings. See § 558 as to Arrest; § 608 as to Injunction; § 638 as to Attachment; § 1693 as to Replevin, which, although not classed as a provisional remedy, is similar in its nature.

12. Definitions and classification of actions found in §§ 3333, 3334, 3335, 3336, 3337, Code.

13. Form of summons.—§§ 417, 418. “The summons must contain the title of the action, specifying the *court* in which the action is brought, the *names* of the parties to the action, and if it is brought in the Supreme Court, the *name of the county* in which the plaintiff desires the trial; and it must be *subscribed by the plaintiff’s attorney*, who must add to his signature his office address, specifying a place within the State where there is a post-office. If in a city he must add the street, and street number, if any, or other suitable designation of the particular locality.”

The body of the summons is as follows:

“To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff’s

attorney within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint."

Dated, and subscribed by plaintiff's attorney.

It is extremely rare in Code practice to have a *form* prescribed, and this is one of the rare instances. All of the elements here provided have a reasonable purpose.

It is plain that a defendant should be informed of the court in which he is sued, and the locality selected for trial, the names of the parties to the suit, and the name and address of the attorney who brings it.

The body of the summons contains in brief and plain phraseology a notification and a warning; a notification of the commencement of the action, and a warning of the consequence of paying no attention to it.

14. Void and irregular summonses.—Unquestionably the statutory requirements should be strictly followed in drafting a summons. If there is a failure to comply with any of the requirements, the result is a defective process. This defect may be so substantial as to render the paper a nullity — no summons at all — or it may be such as to render it irregular only. There is an important consequence following this distinction, namely, a defective process which is merely irregular, while it may, indeed, be set aside for its irregularity, may be made good by amendment, while a void process may not be. If it is null, it is nothing, and you cannot make something from nothing. These distinctions are illustrated in *Dwight v. Merritt*, 18 Blatchf. 305; *Chamberlain v. Bittersohn*, 48 Fed. Rep. 42; *Gibbon v. Freel*, 65 How. Pr. 273.

Upon some points of a summons the decisions are not harmonious. For instance in *Osborn v. McCloskey*, 55 How. Pr. 345, it was held that the direction in the Code to insert the name of the county is mandatory, and that its omission constitutes a jurisdictional defect, while in *Wallace v. Dimick*, 24 Hun, 625, a similar defect was held a mere irregu-

larity, and amendable. The latter authority appears the more reasonable.

The simple designation of the county for trial in this manner:

"Supreme Court, County of New York," is sufficient, although some attorneys spread the statement: "Plaintiff desires the trial to be had in the County of New York." (*Ward v. Sands*, 10 Abb. N. C. 60.)

15. Names of parties.— Parties should be named in the summons by their given and surnames, and not by initials. (*Grant v. Birdsall*, 48 Super. Ct. 427.) If a person uses a name not his proper name he may sue or be sued by that which he uses. (*Bank of Havana v. Magee*, 20 N. Y. 355.) The proper way to bring a partnership into court is by naming the individuals who compose it, not by using the firm name. (*Bannerman v. Quackenbush*, 11 Daly, 529.)

16. Wrong party served.— His remedy is not to defend a suit to which he really is a stranger, but to move to set aside the service. (*Smith v. Jackson*, 20 Abb. N. C. 422.)

17. Right party served under wrong name, not bound by judgment entered by default. (*Fischer v. Hetherington*, 11 Misc. 575.)

18. "Subscription" of summons by attorney need not necessarily be in handwriting. It may be printed or typewritten. (*Mayor v. Gisler*, 10 Daly, 396; *Barnard v. Heydrick*, 49 Barb. 62.)

19. Additional requirements for summonses in certain cases.

a. In *action to recover a penalty* or forfeiture, if the complaint be not served with the summons, a reference to the statute must be indorsed on the summons. (§ 1897, Code.)

b. In *matrimonial actions*, if the complaint be not served with the summons, the latter must have legibly written or printed on its face the words "Action to Annul a Marriage," "Action for a Divorce," or "Action for a Separation," as the case may require. (Code, § 1774.)

20. Notice may be served with summons in certain cases.
— The provisions of sections 419, 420 are for use only where

the summons is served without an accompanying complaint, and the case is one in which, if the defendant defaults, judgment may be entered against him simply by filing the proper papers with the clerk. Actions on contract for liquidated damages, or such as are capable of ascertainment by simple computation, are those here intended. You may, in such actions, if you choose, use this notice to the effect that in the event of defendant's default, judgment will be taken against him for a stated sum of money.

21. Summons deemed the mandate of the court.—As we have seen, no formality attends the issuance of a summons. The court itself has nothing to do with it, nor do its immediate officials. Any attorney, as such, may draw and issue a summons when he desires to commence an action. It is, nevertheless, given the same authority as though the court had itself issued it, for by the language of section 418 it “is deemed the mandate of the court.”

22. Service of summons.—An action must be commenced, and commenced rightly, before any further proceedings can be taken. Section 416 provides that an action shall be “commenced by the service of a summons.” Having drawn our summons, the next thing is to serve it. Under this subject there are several heads — as to who may make service; where service may be made; the methods of service upon individuals, whether they be of full age and competent, or under age or incompetent; and whether they be natural or artificial; and finally the different methods of constructive service and their uses.

23. Who may serve summons.—We are not compelled to employ a sheriff or any other official. Any person may make the service, man or woman, young or old, provided only that he or she is not a party to the action, or under eighteen years of age. (§ 425, and Rule 18, General Rules of Practice.) It is, therefore, irregular for the plaintiff to serve his own summons. If he does so, however, it is an *irregular* service merely, not a void one. The defendant, if he does not wish to waive this irregularity, must move to set aside the service.

(*Hunter v. Lester*, 18 How. 347; *Myers v. Overton*, 2 Abb. Pr. 344.)

24. Where service may be made.—In actions in the Supreme Court the service may be made anywhere within the bounds of the State. Thus far, and no farther. A court may reach its hand to but not beyond the limits of the territory of the sovereignty which created it.

25. Method of service upon adults, and upon infants over fourteen years old.—For purposes of service there is generally no difference between these classes of persons. Service is made by delivering to the defendant and leaving with him a copy of the summons.

26. Method of service upon infants under fourteen.—The same as in the case of those over that age, with an additional requirement, viz.: that a copy shall be served also upon his father, mother, or guardian; or if there is none within the State, to the person having the care and control of him, or with whom he resides, or in whose service he is employed.

The idea of the statute here is that notice should be given not only to the infant of tender years but also to the adult nearest to him and in some measure responsible for his care.

27. Method of service upon persons of unsound mind.—The persons here intended are such only as have been *judicially* declared to be such. The condition of mental incompetency in a legal sense does not attach to an individual no matter under what infirmity he suffers in fact, unless a regular proceeding has been had which has resulted in an adjudication to that effect. One of the incidents of such an adjudication is the appointment of a committee which takes charge of the incompetent and of his affairs. When such a committee has been appointed the statute requires that in any action in which the incompetent is named as a defendant, not only he but his committee shall be served with the summons.

Provision is made in section 429 for dispensing with personal service upon the lunatic when it appears to the court that such service would "tend to aggravate his disorder, or to lessen the probability of his recovery."

28. Method of service in actions against a sheriff for an escape.—The third subdivision of section 426 permits service in this kind of an action to be made upon the official in charge of his office as well as upon the sheriff himself.

29. Additional discretionary requirement for service upon infants over fourteen and persons of unsound mind although not so judicially declared to be is provided for in section 427. The notion is that in exceptional cases, where the ordinary method is not likely to serve the purpose of giving due notice to the defendant, the court is empowered, in the defendant's interest, to designate some person upon whom service shall be made in his behalf. The duty of such person is not clearly pointed out, but it is usually assumed to be that of a temporary guardian *ad litem*.

30. A person leaving the United States who desires to appoint an agent upon whom a summons may be served in an action against the principal may do so by filing a descriptive and authenticated certificate under section 430. As the use of this provision is almost entirely unknown it is not worth while to dwell upon its details.

31. Method of service upon corporations.—The Code makes provision in detail for service upon domestic and foreign corporations. The reasonable purpose of all of these provisions is, as the corporation is an artificial person, composed of and acting through natural persons, to select, of such natural persons, those who may fairly be said to be representative of the corporation.

32. Service upon domestic corporations.—Subdivisions 1 and 2 of section 431 make special provisions for service upon municipal corporations, the one concerning the city of New York, the other, all the other cities in the State. It is the third subdivision which provides for service upon domestic corporations in general, and which is therefore of principal importance. The direction is that a copy of the summons is to be delivered to the president or other head of the corporation, the secretary or clerk, cashier, treasurer, director, or managing agent.

The purpose of the section is satisfied by service upon *any* official of high rank in the corporation, whether here specially enumerated or not; and is unsatisfied by service upon a mere subordinate. For instance, service upon the general superintendent of a telephone company is good (*Barrett v. American Telephone & Tel. Co.*, 31 St. Rep. 465) and upon an employee of a street railway company, who, although called a superintendent, had but certain special matters to attend to in the way of purchasing feed, etc., is not good. (*Emerson v. A. & O. L. R. R. Co.*, 13 Hun, 150.)

33. Service upon foreign corporations.—A proper understanding of section 432, which provides for service upon foreign corporations, requires some familiarity with the principle that jurisdiction in our courts in actions against foreign corporations is not unlimited. Section 1780 expresses the limits, and must be read to understand section 432.

Before a summons is served at all upon a foreign corporation, the preliminary question must first be determined whether the court has jurisdiction of the action. If this be concluded in the affirmative, then the summons may be served either upon the president, treasurer, secretary, or officer performing corresponding functions, if either of such officials happen to come within the State (under subdivision 1); or upon an agent designated by certificate (under subdivision 2), or if there be no such designated agent, and an official designated in subdivision 1 cannot be found within the State, then upon the cashier, a director, or a managing agent within the State; *provided*, the corporation has property within the State or the cause of action arose therein (under subdivision 3).

34. Service on foreign corporation by delivery (under subd. 1 of § 432) **to official merely traveling through State.**—Upheld in *Pope v. Terre Haute C. M. Co.*, 87 N. Y. 137.

35. Managing agents under subdivision 3, section 432.—See *Tuchband v. Chicago & Alton R. R. Co.*, 115 N. Y. 437; *Palmer v. Chicago Evening Post Co.*, 85 Hun, 403.

36. Tricky service not permitted.—One of the principal objects of service, which must always be kept in mind, is that

the defendant shall thereby receive notice of the commencement of the action against him. Where by trick or device this object is defeated, although the requirements of the statute are technically followed, the service is ineffectual. (*Bulkley v. Bulkley*, 6 Abb. Pr. 308; *Mather v. Parsons*, 32 Hun, 338.)

37. Enticement within jurisdiction for purposes of service.—Nor is this permitted. (*Metcalf v. Clark*, 41 Barb. 45; *Baker v. Wales*, 35 Super. Ct. 403; *Steiger v. Bonn*, 59 How. Pr. 496.)

38. A nonresident attending court here either as party or witness is privileged from service.—*Mathews v. Tufts*, 87 N. Y. 568; *Parker v. Marco*, 136 N. Y. 585.

39. Course to pursue in behalf of defendant when summons has been irregularly served.—A service merely irregular may become effective unless a motion be made in behalf of the defendant to set it aside because of the irregularity. This motion should be promptly made, and the better and more careful practice is for the attorney making it to appear *specially* for that purpose alone, and so avoid the effect of a general appearance. (*Phelps v. Phelps*, 6 Civ. Proc. 117; *affd.*, 32 Hun, 642; *Noble v. Crandall*, 49 Hun, 474.)

40. Proper practice when defendant refuses to accept service.—The person making the service should not in such case attempt to force them upon the defendant's person but should state the nature of the papers and the purpose to serve, and then lay them down in defendant's presence and leave them. (*Davison v. Baker*, 24 How. Pr. 39; *Correll v. Granquet*, 12 Misc. 209.)

41. Proof of service.—If it becomes necessary to make proof of the service of a summons, as a basis for further proceedings, one of the methods prescribed by section 434 must be followed. These methods are (1) by sheriff's certificate, (2) by admission of defendant, (3) by affidavit of person making the service.

When a sheriff is employed officially, and does an official act pursuant to such employment, as he does when serving a

summons within his own county, proof of the fact may be made by his simple certificate. If he acts outside of the limits of his official authority, as for instance, where he serves a summons outside of his own county, the service must be proved otherwise than by his certificate. (*Farmers' L. & T. Co. v. Dickson*, 17 How. 477.)

The use of the defendant's admission as a means of proof of service is practically unknown. The common and usual method of proof is by the affidavit of the person making the service.

42. Form of affidavit of service of summons.—The necessary elements of proof of service can be best apprehended by a consideration of the form of the affidavit:

SUPREME COURT.

JOHN DOE	}
<i>agt.</i>	
RICHARD ROE.	

CITY AND COUNTY OF NEW YORK, ss.:

Richard Newton, being duly sworn, says that he is upwards of eighteen years of age; that on the 1st day of December, 1903, at No. 10 Fifth avenue, in the city of New York, he served the summons hereto annexed on Richard Roe, the defendant therein named, by delivering a copy thereof to him personally and leaving the same with him.

Deponent further says that he knew the person so served to be the person mentioned and described in said summons as the defendant therein.

RICHARD NEWTON.

Sworn to before me, De- }
cember 2, 1903. }

OLIVER GOLDSMITH,

Notary Public, New York County.

The details set forth in this form as to place and manner of service and knowledge of defendant's identity are required under the provisions of Rule 18 of the General Rules of Practice.

43. Additional requirement in divorce cases.—In these cases, and in the other matrimonial actions, the affidavit is required further to state what knowledge the affiant had of the person served being the defendant and proper person to be served, and how he acquired such knowledge. Rule 18.

44. Service of summons — other than personal.—There are two of these methods of service, each having an entirely distinct purpose, and each of which should be carefully distinguished from the other. The Code treats them together in article 2 of title I of chapter V.

A subdivision of this article by separating sections 435, 436 and 437 from those which follow would be an improvement.

The three designated sections concern "Substituted Service." Sections 438 to 445 provide for "Service by Publication."

It is to be premised that neither of these methods may be employed as a matter of course, but only under exceptional circumstances, and for limited purposes, and after applying for and obtaining an order.

45. Substituted service.—The use of this method is confined to the case of a defendant *resident* in this State, but who avoids personal service so that it cannot be made. It can never be employed against a nonresident, in the first place, because, by the terms of the statute, its use is restricted to actions against residents, and in the second place, because such process against a nonresident would not be "due process of law," and consequently unconstitutional. The decisions have upheld methods of this description with respect to residents, on the ground that a State may make such regulations as to notice as it pleases concerning its own citizens, and residents who owe to it allegiance. (*Continental Bank v. Thurber*, 74 Hun, 632; *affd.*, 143 N. Y. 648.)

Careful practitioners avoid this method, however, whenever possible, and prefer to exhaust every device for making personal service rather than employ it.

When it is used, the statute requires proof either by affidavit (by a person not a party to the action), or by the sheriff's certificate that proper and diligent effort has been made to serve the defendant, and that his place of sojourn cannot be ascertained, or, if he is within the State, that he avoids service. This affidavit, or the sheriff's certificate, is the necessary foundation for the order, which, in the language of section 436, "must direct that the service of the summons be made by leaving a copy thereof, and of the order, at the residence of the defendant with a person of proper age if upon reasonable application admittance can be obtained, and such person found who will receive it; or, if admittance cannot be so obtained, nor such a person found, by affixing the same to the outer or other door of the defendant's residence, and by depositing another copy thereof, properly inclosed in a post-paid wrapper, addressed to him at his place of residence, in the post-office at the place where he resides; or, upon proof being made by affidavits that no such residence can be found, service of the summons may be made in such manner as the court may direct."

This last sentence was added by amendment in 1896, and was intended to get over the difficulty encountered in *Fisk v. Bennett*, 69 Hun, 272.

The order must be filed, together with the papers upon which it was made, and the service completed within ten days after the order is granted, otherwise the order becomes inoperative. (§ 437.)

46. Service by publication.— This is a topic upon which it is of great importance to have clear ideas. Upon the one hand it must be understood that in most actions jurisdiction cannot be obtained by the mere publication of process, and on the other, that in some cases it affords an indispensable method of procedure. The dividing line must be clearly apprehended.

An action by which a person claims a debt or personal duty, or damages in lieu thereof, or by which a person claims a satisfaction in damages for some injury done to his person or property, is a personal action, and a judgment following such an action commenced by the personal service of process is a personal judgment. A personal judgment is also a personal obligation, and suit may be brought upon it without reference to the original cause of action upon which it was recovered. To all such judgments the principle of *res adjudicata* is applied. Such a judgment can never be obtained merely upon a service by publication. (*Pennoyer v. Neff*, 95 U. S. 714.)

A court cannot reach beyond the bounds of the territory in which its power is recognized and legally efficient, to impose its process and judgments upon persons beyond its reach.

It is for this simple and sufficient reason that a nonresident may not be sued in our courts in a personal action against him, through service by publication.

There is, however, a jurisdiction of an entirely different and distinct character from that respecting persons, namely, that respecting things. A court has authority to act upon persons within its jurisdiction; it has also authority to act upon property within its jurisdiction, and its authority may be exerted by virtue of the presence of the property or thing, and, in such case, notice may be given to any one interested or claiming to be interested in that property, and his rights therein disposed of by the judgment of the court. It is in such cases, and in such alone — actions in their nature *in rem* — that service by publication is effective and permissible.

The judgment following service by publication in such a case is completely effective so far as it disposes of the defendant's rights in the *thing* within the jurisdiction, but has no further effect.

For example, an action to foreclose a mortgage almost invariably has a double purpose — to procure a personal judgment against those liable on the debt, and to procure the ap-

plication of the mortgaged property to the payment of the debt. It is therefore an action *in personam* for one purpose and *in rem* for another. So far as it is *in personam* publication may not be used, while so far as it is *in rem* it may be.

47. The cases enumerated in section 438 as those in which publication may be made must be considered as limited by this principle. Subdivision 1 includes cases where the defendant is

A foreign corporation.

A nonresident natural person.

An unknown person.

A person whose residence is unknown.

It must not be understood here that in every possible action in which, for instance, the defendant is a nonresident, the service of its summons may be made by publication, but only in such cases as the court acquires jurisdiction by process *in rem*, as for instance by attachment.

Subdivision 2 includes cases of resident debtors, who have either left the State or keep themselves concealed therein with intent to avoid service of process. Here, again, there must be a jurisdiction *in rem* to support the service.

For example, in an action to set aside a general assignment on the ground of fraud, the assigned property being situated in this State, service may be made upon the assignors by publication, for the object of such an action is to reach and apply that particular property.

Subdivision 3 applies to persons who although residents of the State are absentee residents, *i. e.*, traveling, or sojourning abroad.

This subdivision also is used in connection with process *in rem* by attachment.

Subdivision 4 permits service by publication in matrimonial actions, where personal service cannot be made, but its use in this class of cases is often dangerous and always unsatisfactory. It is an anomalous use not falling strictly within the principles already stated.

In theory, personal status is a matter for State regulation,

and laws of marriage and divorce concern personal status. States may therefore make such statutory regulations relating to these subjects as may be deemed proper, concerning *their own citizens*. But they cannot reach their process beyond the bounds of the State against persons not their own citizens any more effectively in these cases than in others. A judgment of divorce following service by publication may therefore be effective against a *resident* defendant in a case whereof our courts have jurisdiction, and not otherwise. The use of this method of service in matrimonial actions cannot be recommended.

The following cases may be consulted under this head: *Williams v. Williams*, 130 N. Y. 193; *Doughty v. Doughty*, 12 C. E. Green (N. J. Eq.), 315; *Forrest v. Forrest*, 2 Edm. Sel. Cas. 180; *In re Strong*, 86 Hun, 390; *Rigney v. Rigney*, 127 N. Y. 408; *Matter of Morrison*, 52 Hun, 102; *Munson v. Munson*, 60 Hun, 189; *Campbell v. Campbell*, 90 Hun, 233; *Atherton v. Atherton*, 82 Hun, 179; *Matter of Kimball*, 18 App. Div. 320; *McGown v. McGown*, 19 App. Div. 368.

Subdivision 5 concerns actions which are in their nature *in rem*, such as foreclosure, partition, and the like, where the subject-matter of the action consists of property, either real or personal, physically within the territory over which our courts have authority, and the object of the suit is to affect title to and interest in such property.

Subdivision 6 permits the use of this method of service for the temporary purpose of getting an action under way to avoid the effect of the statute of limitations in connection with the regulations of the particular chapter concerning limitations. Personal judgment cannot, however, follow service by publication in such case.

Subdivision 7 allows service by publication in actions against stockholders of corporations upon the theory that corporations being the creations of statutes may be subjected to such regulation as may be prescribed by the Legislature. See *Pennoyer v. Neff*, 95 U. S. at end of opinion.

48. Limits of use of service by publication.—The main principle of these limits already stated is not discoverable from any direct statement in the Code itself. So far as appears from the language of section 438, there are no such limits, but a reference to sections 1216 and 1217 will show that the statute itself contains limitations consistent with the principle.

An examination of the section last cited will indicate that while orders to serve by publication may be freely obtained, they are useless as a basis for subsequent proceedings unless jurisdiction *in rem* exists. See *Clarke v. Boreel*, 21 Hun, 594; *Bryan v. University Publishing Co.*, 112 N. Y. 382.

49. The instruments of service by publication.—Assuming that a proper case for service by this method exists, it becomes the duty of the plaintiff's attorney to prepare the papers, which are:

- a. A complaint.
- b. An affidavit.
- c. An order.

As the validity of service by publication depends upon a strict compliance with the provisions of the statute, they must be considered with the greatest attention.

a. Ordinarily an action may be *commenced* without a complaint, which may be prepared at a later stage; but if we are obliged to serve by publication, a complaint must be drawn at the outset, and it must be verified, that is, must have subjoined an affidavit of verification. The opening phrase of section 439 is: "The order must be founded upon a verified complaint, showing a sufficient cause of action against the defendant to be served."

b. While the allegations concerning the cause of action are required to be set forth in a verified complaint, the extraneous facts showing ground for publication under section 438 must be set forth in an affidavit. Here it is necessary that an attorney should look through the subdivisions of section 438, and make up his mind under which one the case in hand falls, and draw his affidavit accordingly, so as to include within it

all facts necessary to be shown to entitle him to the order, which comprise also facts showing "that the plaintiff has been or will be unable with due diligence to make personal service of the summons," if the application is made upon the ground that the defendant is a foreign corporation or non-resident, or in a case specified in subdivision 4, 5, or 7 of section 438. The idea of this last requirement is to confine service by publication to cases in which personal service is impracticable. That is to say, even in a case where from the nature of the action and the existence of facts permitting that mode of service, service by publication is proper, it is necessary to show further that personal service cannot be made.

Whether the plaintiff can or cannot "with due diligence" make personal service depends upon facts. For instance he may prosecute inquiries, in any way, as to the actual whereabouts of the defendant to be served and as to the probabilities of his coming within the jurisdiction. If he ascertains the actual absence from the jurisdiction of the defendant, and the improbability of his coming within the jurisdiction within a reasonable time, his investigation and its result will show that with due diligence he will be unable to make service, but his affidavit must contain the *facts* of the investigation in order that the judge may make a valid order of publication. The mere statement in the affidavit that due diligence has been practiced without setting forth the facts showing due diligence is entirely insufficient. *Carleton v. Carleton*, 85 N. Y. 313; *Orr v. Currie*, 14 Misc. 74. Compare *Howe Machine Co. v. Pettibone*, 74 N. Y. 68; *Belmont v. Cornen*, 82 N. Y. 256.

c. The order. This is provided for in section 440. As there is in the court no inherent power to serve process by publication, it follows that whatever power it has comes from, and must be found within the terms of the statute. By this section it is provided that "the order may be made by a judge." As there are two general classes of orders recognized in practice, namely, court orders and judges' orders, it is

obvious that the statute authorizes the use of the latter only for the purpose of service by publication.

The distinction between a court order and a judge's order should here be clearly understood.

The Supreme Court, for instance, exercises general judicial power. A trial results in the judgment of that court, although but a single one of its justices may have presided. In like manner various proceedings in the action before the judgment are disposed of by orders of the court, which in like manner are the result of the exercise of its authority by one of its justices. Where a motion is heard by the court, that is at a regular, formal session of one of its parts, the determination is embodied in a *court order*, which is always drafted in a regular and appropriate form.

Apart from the authority of the court itself, considered as an institution in the nature of a corporate entity, the statute, in a few instances, gives certain express powers to the judges of the court, when not presiding at a regular, formal term. Powers of the description here mentioned are devolved upon the magistrates personally, as distinguished from the court itself, and when exercised, are evidenced by an order not of the court, but by the judge.

A court order is thus the corporate act of the court, while a judge's order is merely an individual official act of the judge, and the radical difference is recognized in the forms in which the different kinds of orders are drafted — the court order being impersonal in its form, and indicating by its "caption" that it was made at some regularly authorized term, while the judge's order is on its face the personal act of the magistrate who makes it, and has no "caption." As we shall see as we proceed through the Code, the statute gives authority to the court alone to make certain kinds of orders, while with respect to certain other kinds it gives such authority to both court and judge. Orders of publication under section 440 are authorized to be made by a judge, and not by the court at all. The curious anomaly is thus presented that in this instance a judge has an authority which his court has not.

(*Schumaker v. Crossman*, 12 Week. Dig. 99; *Phinney v. Broschell*, 19 Hun, 116; *affd.*, 80 N. Y. 554.)

The order must direct publication in two designated newspapers for a specified time, not less than once a week for six successive weeks, *or*, at the option of the plaintiff by service of the summons, complaint and order without the State upon the defendant personally. It must also contain either a direction that on or before the day of first publication the plaintiff deposit in a specified post-office sets of copies of these papers in a securely closed post-paid wrapper, directed to the defendants at places specified in the order, or in proper case an express dispensing with the mailing.

It will be thus seen that there are two methods provided for service by publication; 1st, by actual advertisement in newspapers; 2d, by the alternative method of delivery of the papers to the defendants to be served outside the jurisdiction. It must be carefully noted that if the latter method be adopted, it is merely a method of service by publication, and not of personal service, for true personal service can be made only within the jurisdiction.

It was formerly held in some authorities that to make a valid service by publication in either of the authorized methods, the order should contain directions for *both* methods in the alternative, strictly following the language of section 440; but when the question came before the Court of Appeals it reached the sensible conclusion that if but one only of the methods was named in the order, a good service could be made under its directions. It is always convenient, however, to draw the order in the alternative, so as to be able to adopt either one way or the other to comply with it. (*Matter of Field*, 131 N. Y. 184.)

Life of the order.—Section 441 limits the period within which action must be taken under an order of publication, to three months after it is granted.

Things to be done to make service complete: A. 1. Have summons and notice (provided for in section 442) published in designated papers once a week for six weeks.

2. Mail copies to persons to be served according to directions, *before* first publication.

3. File papers upon which order was granted and the original order in clerk's office *before* first publication; or

B. 1. Serve summons, complaint, and order (with notice under section 443) personally without the State. (See *Ludden v. Degener*, 14 App. Div. 397.)

2. File papers in clerk's office prior to the service.

Completion of service.— It is, of course, important to have a day certain when service by publication can be said to be complete. Section 441 fixes this day as the day of last publication, if that method be employed, or forty-two days after service out of the State, if the alternative method be used.

Where actual publication has been had it is held that service is not complete until the expiration of at least six full weeks from the first publication. "Publication" means more than "printing." (*Market National Bank v. Pacific National Bank*, 89 N. Y. 397.)

When weekly publication of notice is required, it is not necessary to show publication on the same day of each week, it being sufficient if made on any day for the required number of weeks. (*Wood v. Knapp*, 100 N. Y. 110.)

A defendant in default after publication is allowed an extended period to open the default and come in and defend before judgment as a matter of course, and after judgment for good cause. (§ 445.)

CHAPTER II.

APPEARANCE.

50. In the preceding chapter we have examined the means by which authority to adjudicate upon the obligations and rights of a defendant may be acquired, regardless of his assent, through the service of process upon him. By such service a defendant is brought into court whether he will or no. In the nature of things a defendant may obviate the necessity of service of process upon him, by a voluntary submission to jurisdiction.

He may bring himself into court with the same effect upon the rights of the parties as in the case of service of process upon him. This is a general principle of procedure not dependent for existence upon statutory provision, but it is declared in the Code by section 424, which provides that "A voluntary general appearance of the defendant is equivalent to personal service of the summons upon him."

51. **Appearance conferring jurisdiction.**—It may be said generally that any appearance in court by the defendant or an attorney for him, in the proceedings, or a signature of any paper in the cause by an attorney as representing the defendant — unless it be specially limited — will operate as a general appearance and give the court jurisdiction, although the summons has not been properly served.

So the procuring of an extension of time to answer the papers stating the name of the attorney as "defendant's attorney" has been held a sufficient general appearance to confer jurisdiction; and likewise, service of a notice of motion signed as defendant's attorney. (*Ayres v. West. R. R.*, 48 Barb. 132.)

If it is desired therefore to appear for a particular purpose only and not submit the defendant to the jurisdiction of the court for all the purposes of the action; as for instance upon

a motion to set aside the service of a summons, the attorney should sign the papers not as "defendant's attorney," but as "attorney for the purposes of the motion only." (*Mack v. American Express Co.*, 20 Misc. 215.)

52. Effect of general appearance.—After an act has been done by or in behalf of a defendant amounting to a general appearance it is not open for him to contend that the court has failed to acquire jurisdiction of his person. (*Olcott v. Maclean*, 73 N. Y. 223; *Reed v. Chilson*, 142 N. Y. 152.)

53. Jurisdiction of subject-matter not within this principle.—A defendant by voluntary appearance may waive any question affecting him personally, but a voluntary appearance will not give a court jurisdiction in a case where the law does not give it. (*Brooks v. Mexican Construction Co.*, 49 Super. Ct. 234, 50 Super. Ct. 281; *Heenan v. N. Y. W. S. R. R. Co.*, 34 Hun, 602; *Parkhurst v. Rochester L. M. Co.*, 65 Hun, 489; *Weidman v. Sibley*, 16 App. Div. 616, note in 18 Abb. N. C. 435.)

54. Formal appearance.—Appearance has thus far been considered as a means of subjecting the defendant to jurisdiction. Should a defendant desire to appear in an action formally, and secure all the advantages of such an appearance, his attorney must serve either a notice of appearance, or a pleading, within the time named in the summons, namely, within twenty days after the service of the latter. When a defendant thus appears in an action he secures the right of having notice of every step in the action served upon his attorney.

If, within the time specified, the defendant or his attorney serves an answer or demurrer, the formal appearance is complete and no other paper is necessary. If no pleading is served within that time, a notice of appearance should be served, and the defendant's time to plead enlarged, either by consent or order. The notice simply announces the fact of the defendant's appearance, is signed with the name of the defendant's attorney, and is required to contain the same particulars as to attorney's office and post-office address, etc., as is prescribed with reference to the summons. (§ 421.)

55. Demand for complaint.—Where a notice of appearance is served for a defendant, following the service of a summons upon him without a complaint, it should contain also a demand that the complaint be served. If this demand be omitted, judgment may be taken against the defendant for default in pleading, notwithstanding his appearance. (§§ 422 and 479.)

56. Unauthorized appearance.—The question to be considered under this head is as to the effect of an appearance by an attorney for a defendant, where the defendant had given him no authority for that purpose. The general principles of the law of agency do not here obtain, and the reason for the principle adopted by the decisions is that it is preferable that there should be an occasional instance of private inconvenience, rather than the general embarrassment in the administration of justice which would result from the adoption of the contrary principle. So far as the parties to an action are concerned, either rule might possibly work an injustice to one or the other of them. From the standpoint of the plaintiff it would seem that he should be allowed to rely upon the presumption that an attorney as an officer of the court acts within his authority, and that when an attorney appears for a defendant no investigation need be made into his authority; while, on the other hand, a rule binding a defendant by a proceeding of which he knows nothing, in which his rights have been subjected to the jurisdiction of the court, is not satisfactory to the common sense of justice. In this State the general rule in such cases was established in the case of *Denton v. Noyes*, 6 Johns. 297, in which it was held that an unauthorized appearance would support a judgment, and that a defendant injured thereby would be left to his action against the attorney; but in cases of fraud or of lack of pecuniary responsibility to answer in damages on the part of the attorney a motion would be entertained *in the same action* to relieve the defendant from the consequences of the appearance. (See also *Brown v. Nichols*, 42 N. Y. 26, where the same principle is stated with some of the reasons which sup-

port it; *Sperry v. Reynolds*, 65 N. Y. 179, where the principle was not applied in an action in a justice's court, because attorneys in such courts are mere agents; *Ferguson v. Crawford*, 70 N. Y. 253, a case of *forged* appearance; *Vilas v. Plattsburgh & Montreal R. R. Co.*, 123 N. Y. 440, limiting the doctrine to cases where the defendant is a resident of the State.)

57. **Withdrawal of appearance.**—Where an appearance is made by an attorney, without authority from his client, it may be withdrawn by permission of the court upon a motion made for that purpose, but not otherwise. (*Galt v. Provident Savings Bank*, 18 Abb. N. C. 431; *Hunt v. Brennan*, 1 Hun, 213.)

CHAPTER III.

PLEADING.

58. Introductory.—After the parties are “in court,” the plaintiff by his own act in bringing suit, and the defendant either by service of process or by appearance, the next stage of the proceeding is for them, respectively and in order, to state what they are there for. It is for the plaintiff to allege his cause of action, by setting forth facts which, if true, will entitle him to judgment, and for the defendant to state the grounds of his resistance to the plaintiff’s demand. It is not the business of courts to ascertain the subjects of controversies, but that of the parties themselves. Courts are not, strictly speaking, institutions to do abstract justice between parties, but rather to determine controversies which parties themselves state. It may be that a plaintiff has a good cause of action, yet, if he does not state it, the court cannot and will not aid him; while a defendant may have a sufficient defense, yet if he keeps it to himself, it will not avail him against the plaintiff’s demand. Hence the necessity of those preliminary statements collectively termed “the pleadings,” in which the respective contentions of the parties are set forth, and by which each adverse party is informed of the claim or defense of his adversary, and the court has placed before it the statements which are to be the subject of trial, and by which the trial may be planned.

Pleadings are therefore common to every system of judicial procedure, and, whatever the character of the tribunal, rules of pleading, intended to be practically useful, have been developed in connection with the actual administration of justice.

The English courts of common law, in the course of administering justice, developed rules of pleading, originally simple, but which, after centuries of cultivation, becomes highly arti-

ficial, technical, and complex. The doctrines of pleading at common law thus became a part of the common law itself and were imported by the American colonists as a part of their machinery of justice. In like manner the rules of equity pleading became developed in the course of the actual administration of equitable principles in the English Court of Chancery. As the judges and practitioners in the ancient Courts of Chancery drew much of their learning from the Roman law, many of their notions of procedure were taken from the same source, and the principles of equity pleading are to be traced from such foundations through the later inventions and developments of the chancery lawyers.

Courts of equity, patterned as to principles and procedure after the English chancery, were also established in the Colonies side by side, as in the old country, with the courts of common law, and continued down to the Revolution. The principles and methods of the administration of justice were not disturbed by the Revolution. The sources of authority and power changed from the English crown to the State governments, but the standards of justice were no more affected by the political changes than were those of morality.

We, therefore, bear in mind that originally in this country we had two distinct classes of tribunals, those at common law and those in equity, each having its distinct methods of practice and procedure.

About the middle of the nineteenth century there was instituted in the United States the reform, which has since been very generally, although not yet completely, adopted, of combining into one tribunal, under one system of practice, the two jurisdictions of law and equity. This combination of jurisdictions was made the occasion of a general attempt at improvement in practice and pleading. With the common-law principles of pleading as a foundation, the so-called "code pleading" is an attempt to retain the useful of the older systems while cutting away that which had become merely technical and burdensome.

This review is necessary to bring into prominence the im-

portant fact that chapter VI of the Code of Civil Procedure entitled "Pleadings in Courts of Record" does not contain a system of pleading, but merely the statutory alterations in a system of pleading already in existence.

59. Principal characteristics of common-law pleading.—

At common law for every breach of legal right there was provided a particular remedy, and a special *form* of action for each.

If the facts in a given case gave a right of action in debt or assumpsit or trespass, the appropriate form of action was selected by the plaintiff, and his declaration (that being the name of the pleading corresponding to our complaint) drawn according to the regular and formal precedent.

If the facts of a case did not fall within one of the recognized forms of action, the plaintiff had no remedy; and if, having a good right of action, the plaintiff misconceived the form, he failed.

In the defendant's first pleading he would, according to the regular precedents, set forth the grounds of his defense. It then became the plaintiff's business to interpose a pleading answering the defense; and so on, each party successively would be required to plead until a point was reached where a material fact to the controversy between the parties was affirmed by one party and denied by the other. This point in difference was termed "the issue." It was "the issue" which was tried, and the trial and determination of the issue determined the action. Every material fact affirmed by either party and *not* denied by the other was for the purposes of the action taken as true, so that if the plaintiff in his pleadings set forth, in proper form, the facts constituting a cause of action, and the defendant, having the opportunity to deny and defend, omitted to do so, his silence was taken as admission of the facts pleaded against him, and judgment followed against him without a trial, for in such case there was nothing to try. In like manner if the defendant set forth in his pleading a good defense, to which plaintiff pleaded nothing in reply, judgment went in defendant's favor upon the plead-

ings themselves. In the development of the common-law system of pleading excessive prominence was given to matters of form and the rule of strict construction constantly enforced, and these circumstances led to the general adoption of the reformed system of practice under Codes of Procedure and Practice Acts.

60. Principal changes in pleading worked by the Code.—

The Code abolished the forms of action; rendered unnecessary the adherence to any prescribed precedents; and reversed the rule of strict construction, substituting therefor the principle expressed as follows in section 519: "The allegations of a pleading must be liberally construed with a view to substantial justice between the parties."

The Code also limits the number of pleadings, generally speaking, to one on each side, the plaintiff stating the facts constituting his cause of action in his complaint, and the defendant the facts constituting the basis of his resistance to the plaintiff's demand in his answer. Here, except in the instances hereafter mentioned, the pleadings end.

The extent of the change wrought by the adoption of the Code has been well expressed by Judge Duer in *Fry v. Bennett*, 5 Sandf. 54: "The Code in abolishing a division of actions that was in a measure merely arbitrary, and all forms of pleading inconsistent with its own provisions, has been careful not to abolish those rules of a sound logic, by which the sufficiency of pleadings is to be determined. Rules which were purely technical and had reference solely to the particular form of the action in which they were applied are, doubtless, abolished; but those which having their foundations in reason and good sense are an important aid in the investigation of truth, and manifestly tend to the furtherance of justice, retain all their original force and authority." (See also *Stevens v. The Mayor*, 84 N. Y. at p. 304; *Clark v. Dillon*, 97 N. Y. 370; *Cook v. Warren*, 88 N. Y. 37.)

61. The main principle of Code pleading.—Under certain conditions of fact the law gives a person a right in action, that is, a right to maintain an action in court against

another person. If successful the party prosecuting the action recovers a judgment against the other party which he may carry into effect through the methods provided by law.

For instance, if two persons conduct transactions out of which contractual rights and obligations arise, and one of them breaks his obligation and so injures the other, the latter has a right to prosecute an action against the former for the damages which he can prove have arisen from the injury.

When he gets the defendant into court through the means already described, he must allege in his complaint the *facts constituting his cause of action*. In the case supposed what are such facts?

Obviously these: 1st, The facts showing the contract, and all the elements which go to the formation of a contract; 2d, The facts showing the breach; 3d, The facts showing the resultant damage.

All of these facts together are the facts constituting the cause of action in such a case, and the absence of any of them in a complaint would render it defective. Every cause of action, whatever its character, may be analyzed into similar elements. There must always be a right of the plaintiff (or him whom he represents) invaded by the defendant with resultant damage, and the facts showing the right, injury, and damage are the facts constituting the cause of action.

Upon these considerations is founded the main principle of Code pleading, which is that the party is required to allege the facts constituting his cause of action or defense, without regard to formal precedent, but avoiding on the one hand the statement of conclusions of law, and upon the other the statement of his evidence.

For cases illustrating necessity of pleading all the facts constituting a cause of action see *Van Leuven v. Lyke*, 1 N. Y. 515; *Walter v. Bennett*, 16 N. Y. 250; *Conaughty v. Nichols*, 42 N. Y. 83; *Ross v. Mather*, 51 N. Y. 108; *Farron v. Sherwood*, 17 N. Y. 227; *Salisbury v. Stinson*, 10 Hun, 242; *Lent v. N. Y. & M. R. R.*, 130 N. Y. 504; *Hicks v. Walton*, 14 App. Div. 199; *Scofield v. Whitelegge*, 49 N. Y.

259; *Underhill v. Phillips*, 10 Hun, 591; *Conkling v. Gandall*, 1 Keyes, 228.

62. The fault of pleading conclusions.—The foregoing illustrations will show that every cause of action has its elements of fact, and all of the elements must be present to make the cause of action complete. It will not answer in pleading to substitute a conclusion for these necessary facts. It will not serve a plaintiff, for instance, to allege that the defendant “owes” him, or “is indebted” to him, or “under obligations” to him. The facts showing the debt or obligation must be set forth. Where ownership is an essential element it should be alleged. It will not be sufficient for a plaintiff to allege that he was “entitled to the possession of certain land and to the rents and profits.” He must allege his title and its sources. (*Sheridan v. Jackson*, 72 N. Y. 170.)

So, where a right to recover upon a policy of insurance depends upon the performance of certain acts by the plaintiff, as conditions precedent, the averment “that the whole of said sum is now due” is a mere conclusion which will not take the place of the necessary facts. (*Doyle v. Phenix Ins. Co.*, 44 Cal. 264.) For further illustrations see citations in Bliss’ Code, under section 481.

63. The fault of pleading evidence.—This is of an opposite character from that of pleading conclusions. The elemental facts of a contract are, for instance, assent, subject-matter and consideration. The evidentiary facts of the same contract would consist of acts, conversations, correspondence between the parties, etc. In pleading we would not narrate these evidentiary facts but merely allege the elemental.

Ordinarily this is a fault in style merely; that is, a pleading which contains too much is not as faulty as one that contains too little, and a complaint, if it contained all necessary facts to constitute a cause of action, would not be condemned, because some of them were evidentiary or detailed with unnecessary particularity.

It is possible, however, for a complaint which sets forth

evidentiary facts alone to be substantially and fatally defective. (*Rogers v. Milwaukee*, 13 Wis. 682.)

64. Incidental facts included by implication.— Sometimes a single phrase or expression, having a well-understood legal significance, will stand for a group of facts.

For instance, delivery of a promissory note and an indorsement in writing are necessary elements to the liability of an indorser. Yet a statement that A. indorsed a note to B. sufficiently expresses both of these facts. (*Prindle v. Caruthers*, 15 N. Y. 425; *Thorp v. Keokuk Coal Co.*, 48 N. Y. 253; *Van Rensselaer v. Bonesteel*, 24 Barb. 365.)

Again, a public fact may be a part of the facts necessary to constitute a cause of action, but as facts of that description are not required to be proved because the court takes judicial notice of them, so they need not be alleged. (*Shaw v. Tobias*, 3 N. Y. 188; *Swinnerton v. Columbian Ins. Co.*, 37 N. Y. 174; *People v. Snyder*, 41 N. Y. 397.)

65. Liberal construction.— Under the rule of common-law pleading, every pleading was construed strongly against the pleader; nothing could be presumed in its favor; and the formal precedent was required to be followed. The Code introduced the opposite principle of liberal construction:

“§ 519. The allegations of a pleading must be liberally construed with a view to substantial justice between the parties.”

Form and precedent thus became immaterial. Elegance or precision of statement are not even essential, but notwithstanding the utmost liberality in construction it is still necessary that no essential should be omitted from the facts alleged, for no rule of liberal construction will supply a missing fact. (*Clark v. Dillon*, 97 N. Y. 370; *Moore v. Lehman*, 52 N. Y. Super. 283; *Cook v. Warren*, 88 N. Y. 37.)

66. Abbreviated forms authorized in special cases.— The Code in a few instances, for purposes of convenience, authorizes a departure from the principles already considered. These instances are those provided for in sections 530 to 535, both inclusive.

A. Private statute.—§ 530. Where a right of action in any way depends upon a private statute, such statute becomes a necessary fact to be pleaded. Upon general principles it would have to be pleaded in full. This section makes a reference to it sufficient.

B. Account.—§ 531. If an account is part of the necessary facts this section permits the omission of the items in the pleading, but provides for their statement in a separate paper if demanded.

C. Judgment of court of special jurisdiction.—§ 532. Upon principle all the facts showing jurisdiction would have to be set forth. Here it is permitted to plead the conclusion that the judgment was “duly” given, but if this be controverted, complete proof must be made.

D. Performance of condition precedent.—§ 533. Where a right of action in contract depends upon the performance by plaintiff of conditions precedent, the facts showing such performance are of course part of his cause of action, and as such, upon principle, would be required to be set forth. Here again it is permitted to plead the conclusion that the plaintiff “duly performed all the conditions on his part.” Here again, however, complete proof is required, if the allegation be controverted.

E. Instrument for the payment of money only.—§ 534. A cause of action upon such an instrument may be pleaded by setting forth a copy of it, with the statement that there is “due” thereon from the adverse party a specified sum. But this abbreviated method may be used only where there is a complete obligation upon the face of the written instrument—not where the obligation, in part, depends upon extrinsic facts. (*Rose v. Meyer*, 7 Civ. Proc. 219; *Judd v. Smith*, 3 Hun, 190; *Tooker v. Arnoux*, 76 N. Y. 397.)

F. Slander and libel.—§ 535. This section makes some changes in the common law with reference to pleading in such cases. The rule of pleading in such cases has always required great particularity of allegation. It is required that the complaint shall contain plain allegations that the

words complained of were spoken or written of or concerning the plaintiff — and the identical words must be pleaded. In case of slander (oral defamation) it must also be alleged that the hearers understood the words in the sense maintained by the plaintiff. Where the words are ambiguous or ironical, the true sense as maintained by the plaintiff must also be alleged, and where the language is not defamatory on its face, the old rule was that all the explanatory extrinsic facts had to be set forth. It is upon this point that the Code provides an abbreviated method of statement. The rule under this section is, that concerning such extrinsic facts the plaintiff may allege generally that the defamatory words were spoken of him — without going into the facts leading to such conclusion. It is still necessary, however, notwithstanding this provision of the Code, to allege facts explanatory of doubtful expressions.

The last sentence of section 535 makes another special provision of pleading with reference to this class of actions, to the effect that the defendant may prove mitigating circumstances although he has pleaded and attempted to prove a justification. This provision enables the defendant in such case to take inconsistent positions. Without it, if he should set up a justification and fail, it is obvious that he would not be permitted to mitigate his offense.

67. Election of remedies.— A given state of facts may offer to a plaintiff a choice of remedies. For example upon a contract to sell real estate which has been broken a plaintiff may sue either at law to recover damages, or in equity for a specific performance.

Again a sale of goods sometimes may result in different rights of action to the seller. He may under certain circumstances avoid the sale and recover the goods, or confirm the sale and recover the price. Again one party may wrong another in such a way that a contract is implied in law against the wrongdoer. Here is a choice to the person wronged to sue for damages for the tort, or upon the implied contract.

In these, and other cases of a like nature, the plaintiff must make up his mind as to his theory of action and have his complaint drafted in accordance therewith. He must take one course or the other, and, of course, not both, and, under some conditions, a choice once made precludes any other course than the one chosen. (*Morris v. Rexford*, 18 N. Y. 552; *Rodermund v. Clark*, 46 N. Y. 354; *Powers v. Benedict*, 88 N. Y. 605; *Moller v. Tuska*, 87 N. Y. 166; *Fields v. Bland*, 81 N. Y. 230; note in 22 Abb. N. C. 270; *Fowler v. Bowery Savings Bank*, 23 Abb. N. C. 133, and note on p. 145; *Deitz v. Field*, 10 App. Div. 425.)

68. Indivisible causes of action.—Where a single right of action exists in favor of a party he has the right to bring a single action upon it, but not to split up a single right and bring separate suits for the fragments. For example, if a man loans another \$100 and refuses payment, the loaner has a right to bring one action to recover the loan, but not to bring one action to recover \$50 and afterward another to recover the other \$50.

In like manner the damages accruing from a single wrongful act must be sued for in a single action. If this rule be violated and a partial recovery had, it bars any further action upon the same right. (*Secor v. Sturgis*, 16 N. Y. 548; *Farrington v. Payne*, 15 Johns. 432; *Smith v. Jones*, 15 Johns. 229; *Nathans v. Hope*, 77 N. Y. 420; *Perry v. Dickerson*, 85 N. Y. 345.)

69. Anticipating defense.—The main principle that the complaint should contain only the facts constituting the cause of action, makes it improper to put in any matter anticipating and explaining the defense. (*Sands v. St. John*, 23 How. Pr. 140.)

70. Different counts for the same cause of action.—It was the practice at common law for a plaintiff sometimes in his declaration to set forth different "counts" or narratives of the same cause of action; that is, to tell his story in two or three different ways. When he came to the trial he would then elect which count he would proceed upon. The question

has frequently arisen whether under the Code different counts may be pleaded in a complaint. It would seem in principle that they should not, although the decisions differ. (*Nash v. McCauley*, 9 Abb. Pr. 159; *Lackey v. Vanderbilt*, 10 How. Pr. 155; *Fern v. Vanderbilt*, 13 Abb. Pr. 72; *Roberts v. Leslie*, 46 Super. Ct. 76; *Blank v. Hartshorn*, 37 Hun, 101; *Rothschild v. Grand Trunk Ry. Co.*, 30 N. Y. St. Rep. 642.) But it is proper to join a count upon an account stated with one upon the original debt. (*Johnson v. Tyng*, 1 App. Div. 612.)

71. Formal construction of complaint.—Section 481 requires the complaint to contain:

1. The title of the action; that is, the name of the court and the names of all the parties, plaintiff and defendant.

2. If the action be in the Supreme Court the name of the county where the plaintiff desires the trial to be had.

3. The statement of facts constituting the cause or causes of action.

4. The demand for judgment.

Names.—Concerning names the following rules may be noted:

1. Where a defendant is known by two names he may be sued by either, or by that which he generally assumes, whether it be his true name or not. (*Eagleston v. Son*, 5 Robt. 640; *Cooper v. Burr*, 45 Barb. 9.)

2. "Junior" and middle initials are not legal parts of names. (*People v. Cook*, 14 Barb. 259; *McDuffie v. Clark*, 39 Hun, 166.)

3. If there be a misnomer in *both* summons and complaint the proper remedy is to set up the defect in the answer as a plea in abatement. If the names differ in summons and complaint, it is the complaint which is irregular, and a motion should be made to set it aside. (*Tuttle v. Smith*, 14 How. Pr. 395.)

4. If objection to a misnomer be not taken in the appropriate manner at the proper time it will be disregarded.

(*Bank of Havana v. McGee*, 20 N. Y. 355; *Traver v. Eighth Ave. R. R. Co.*, 6 Abb. Pr. N. S. 46.)

72. Demand for judgment.—The last of the formal elements of a complaint is the demand for judgment, in which the plaintiff asks the court to make the award to which he deems himself entitled by the facts which he has stated.

Whenever the facts show ground for both legal and equitable relief, there is no reason why both should not be claimed, provided they are not inconsistent with each other. (*N. Y. Ice Co. v. Northwest Ins. Co.*, 23 N. Y. 357; *Sheehan v. Hamilton*, 3 Abb. Pr. N. S. 197; *Linden v. Hepburn*, 3 Sandf. Super. Ct. 668.)

A plaintiff cannot recover a larger sum than he asks for in his complaint. If he finds he has asked for too little he should move to amend his demand. If a plaintiff neglects to ask such an amendment until after verdict he cannot then enlarge a demand. He must either content himself with the sum asked or get a new trial. (*Pharis v. Gere*, 31 Hun, 443.)

In equitable actions it is well always to add a prayer for general relief, which is usually added to the demand for specific relief, in this form, "and for such other and further relief as to the court shall seem just." (*Hemson v. Decker*, 29 How. Pr. 385.)

73. Joinder of different causes of action in one complaint.—Section 484 *permits* the plaintiff to join in one action, and in one complaint, several causes of action, with these limitations:

1. That all of the causes united shall belong to *one* of the subdivisions of the section.

2. That they shall be consistent; to guard against the contention that this section might permit the joinder of inconsistent counts in such cases, already considered, as plaintiff is compelled to make an election.

3. That they shall affect all the parties to the action.

4. That they shall not require different places of trial.

Within these limitations the general scheme of the section

is to permit the joining of actions of the same character between the same parties; but the ninth subdivision permits actions of different character to be joined, provided they "arise out of the same transaction." It is impracticable to generalize upon the decisions as to what "the same transaction" means, and when a cause of action shall be deemed to "arise out of it," and what the "same subject of action" means, and when transactions are to be deemed connected with it. (See *Wiles v. Suydam*, 64 N. Y. at p. 177.)

The better practice in every case of doubt is not to join the actions in one complaint but to bring them separately.

74. Verification.— Unless it is specially required for a particular purpose it is not necessary to have a complaint verified, *i. e.*, an affidavit of verification added. It is sometimes required, as for instance where an application is made for an order of publication, that a verified complaint shall be presented; and when a complaint is verified it sometimes simplifies proceedings to obtain judgment by default; and in every case, except as hereafter noted, a verification of the complaint necessitates the verification of subsequent pleadings; but *as a pleading* the complaint is perfect without verification at all. It is the usual practice, however, to verify complaints, and it is therefore important to clearly comprehend what is sworn to, and who may swear to it.

75. What is sworn to in an affidavit of verification.— The person making the affidavit is required to swear that the pleading is true to his knowledge, *except* as to the matters *therein stated to be alleged on information and belief*, and that as to those matters he *believes* it to be true. (§ 526.) It will be noted that he makes absolute oath to the truth of everything in the pleading, excepting such allegations as in the pleading itself are stated to be made merely upon information and belief, as to which the affiant swears — not to their truth — but merely to his belief in their truth. As we shall presently see, the affidavit may sometimes be made by a party and sometimes by some one else. In either case the pleading itself is that of the party, and in form the alle-

gations are his, although the affidavit attached may be that of another person. (§ 524.)

76. Allegations upon information and belief.—The allegations of a pleading may be unqualified in form, or they may be made upon information and belief merely. It is not important which form is used apart from the matter of verification. As a pleading, a complaint or answer is just as good if every allegation in it is qualified by the expression "upon information and belief," but when any one, whether a party or not, makes an affidavit of verification, he must remember that the statute holds him responsible for the truth of everything in the pleading not so qualified.

An attorney therefore should be careful to make use of the qualifying phrase with respect to every allegation of a pleading concerning which the person verifying is not willing to take full responsibility. (§ 524; *N. Y. Marbled Iron Works v. Smith*, 4 Duer, 362.)

77. Who may swear to the affidavit of verification.—Ordinarily the party himself makes the affidavit. If there be more than one party, and the pleading is that of all of them, one of them only need make the affidavit. For instance, if there be a number of plaintiffs, one may sign the affidavit; and in like manner one of several defendants united in interest may sign. Where there are separate answers for different defendants of course each one must provide the verification of his own answer.

Corporations.—When a domestic corporation is a party, one of its officers must make the affidavit. (*Meton v. Isham Wagon Co.*, 15 Civ. Proc. 259.) For a foreign corporation the attorney in the action verifies.

Absent party.—Where, at the time a pleading is to be verified, the party is absent from the county of the attorney's residence (or if the latter be a nonresident absent from the county where he has his office) the attorney may verify.

Attorney or agent may also verify where the action or defense is founded upon a written instrument for the payment of money only; or where all the material allegations

of the pleading are within the personal knowledge of the agent or attorney. (§ 525.)

78. Addition to form of affidavit where a person other than the party verifies.— The affidavit in such case must set forth “the grounds of his belief, as to all matters not stated upon his knowledge, and the reason why it is not made by the party.” (§ 526; *Duparquet v. Fairchild*, 49 Hun, 471.)

79. Other formal details.— A complaint should also be subscribed by the attorney, folioed, and indorsed. (§ 520; Rule 19.)

80. Time for service of complaint.— This may be done simultaneously with the summons. If the summons be served alone, the complaint need not be served unless within twenty days after service of the summons a demand for a complaint is served by the defendant’s attorney. In that event the complaint must be served in accordance with the demand, within twenty days after service of the latter. (§ 479.)

It has been held improper practice to make personal service of a complaint on the defendant following the service of the summons. (*Sweet v. Sanderson*, 6 Civ. Proc. 69.)

81. Pleading by the defendant.— After the complaint is served, if the defendant desires to dispute the plaintiff’s right to recover, it becomes his attorney’s business to determine the course to be adopted and to prepare the appropriate pleading in his behalf. Save in the exceptional instances hereafter noted, there is but a single pleading upon each side; the Code practice in this particular being in broad contrast to the common-law system with its extended line of pleading. At this point it is important to comprehend the provisions of section 522, in which it is provided that “each material allegation of the complaint not controverted by the answer * * * must for the purposes of the action be taken as true.”

So far this is a repetition of the common-law rule which extended the same principle to every pleading in use. Thus,

at common law, every allegation in the declaration not controverted by the plea was taken as true, and every allegation in the plea not controverted in the replication was taken as true, and so on to the last pleading.

But under the Code it is obvious that as the pleadings usually end with the answer, there may be statements in that pleading which are not controverted because the plaintiff has the use of no pleading in which to controvert them. In such case the Code provision makes a statutory issue, in place of the conventional issue of the common law. This provision, in the latter part of section 522, is as follows: "But an allegation of new matter in the answer * * * is to be deemed controverted * * * by traverse or avoidance as the case requires."

But this statutory issue has no application to the complaint, and as to this, the defendant's attorney must bear in mind that everything in the complaint which he does not deny is deemed to be admitted. With this principle in view he concludes whether the case is one for demurrer or answer.

82. General principles of the demurrer.—Recurring to the principles of jurisdiction already mentioned, we must remember that courts have to do only with obligations, recognized as either legal or equitable, and that there are many human injuries and grievances with which they have nothing to do. We have already seen that the parties must be brought into court before any controversy is presented for adjudication; that the court must also have jurisdiction of the subject-matter, and that the burden is upon the plaintiff to put into his complaint allegations of fact which make up a complete cause of action. These principles are fundamental. There are other principles, not fundamental indeed, but readily apprehended as entirely reasonable devices for the orderly administration of justice; for instance, that those who sue as plaintiffs shall have a joint right, in which they have a common interest; that where a number of parties are interested in the same right or subject to the same obligation, they shall all come or be brought into the action; that while

one action is under way, another involving the same subject-matter shall not be heard; that a plaintiff shall not bring together in one action causes of such a character as may not under the statute be joined.

If it be made plain to the court that it has no authority over parties or subject-matter, or that the plaintiff has no cause of action against the defendant, it becomes its duty to say that it will have nothing more to do with the business; the limitation of its power forbids it to go any farther.

So, if there be a violation of one of the minor regulations, with respect to parties, another action pending, or improper joinder; and the attention of the court be properly directed to the breach, it will, in like manner, decline to go any farther.

Now suppose *upon the face of the plaintiff's own story*, as told in his complaint, any of these obstacles to the prosecution of his suit appears. The defendant in such a case may *demur* or await the judgment of the court as to whether the action should proceed. The foundation principle of the demurrer to the complaint is that it introduces no fact not stated by the plaintiff, and (by not denying) admits the facts stated in his complaint. Whenever, under the extended system of pleading at common law, either party desired to claim that the pleading of his adversary exhibited either a substantial or formal defect, upon its face, he interposed a demurrer for the purpose of procuring the judgment of the court upon the sufficiency of the pleading demurred to.

83. Issue of law.— A demurrer is said to raise an “issue of law.” (Code, § 964.) This expression is employed in rather a figurative sense. An issue of fact arises from an affirmation of a fact and its denial. An issue of law might be supposed to arise from the affirmation of a rule of law and its denial, yet, both affirmation and denial are, in pleading, understood without being expressed. A complaint, as we have seen, must contain *facts* constituting a cause of action, and nothing else; but a plaintiff, in pleading such facts and demanding judgment, invokes, by implication, the

principles of law which he supposes applicable. The demurrer, when interposed, although not expressly, yet, by implication, denies either the principle or that the principle is applicable, and so an "issue of law" is figured out.

84. Admission by the demurrer of facts in pleading demurred to.—As a demurrer denies nothing, it follows from one of the principles of common-law pleading, still alive, that the allegations of the pleading demurred to are, for the time, admitted. The argument of the demurrer proceeds upon this assumption. This principle, accurately expressed, is that a demurrer admits all the material and issuable facts in the pleading demurred to. Irrelevant facts and conclusions of law are not admitted. (*Bogardus v. New York Life Ins. Co.*, 101 N. Y., at p. 336; *Angell v. Van Schaick*, 30 St. Rep. 714; *De Puy v. Strong*, 37 N. Y. 372.)

85. While a demurrer is on the record the facts of the pleading demurred to cannot be questioned.—It follows from this principle that if a defense be demurred to and the demurrer overruled, proper practice requires a withdrawal of the demurrer before an issue of fact can be tried. (*Cutler v. Wright*, 22 N. Y. 472.)

86. A demurrer bad in part is bad altogether.—For example:

1. Where a complaint contains more than one cause of action, and a demurrer is interposed to the whole complaint, if *one* of the causes of action is good, though all the rest are bad, the demurrer must fail.

2. Where several defendants join in a demurrer, if a good cause of action is stated as to any one of them, the demurrer must fail as to all.

This is not a rule of technicality, but of logic. The demurrer in such case is too broad. In the first case supposed the demurrer should have been to the separate causes of action, and in the other case in behalf of the separate defendant as to whom no cause of action was stated. (*Boyle v. City of Brooklyn*, 71 N. Y. 1; *Wheeler v. Conn. Mut. Life*

Ins. Co., 82 N. Y. 543; *Hale v. Omaha Nat. Bank*, 49 N. Y. 626; *Moore v. Monell Co.*, 27 Misc. 235.)

87. A demurrer opens up the record.— This is a rule of the common-law system still operative under the Code. It is applied, for instance, in a case where an answer is demurred to, when the sufficiency of the complaint also may be called in question. (*Harvey v. Brisbin*, 16 St. Rep. 42; *Richards v. Brice*, 22 St. Rep. 289; *Holmes v. Northern Pac. R. Co.*, 65 App. Div. 59.)

88. Grounds of demurrer specified in section 488.— Subdivisions 1 and 2 relate to the subject of the court's jurisdiction:

1. As to the person of the defendant.

2. As to the subject-matter of the action. It is not competent under the first ground for demurrer to raise any question because of an irregular or defective service of the summons. That would necessitate going outside the pleadings, which is not permissible in any case of demurrer.

The meaning of the expression that "the court has not jurisdiction of the person of the defendant" is that the person is not *subject* to the jurisdiction of the court, and not that the suit has not been regularly commenced. (*Nones v. Hope Mut. Life Ins. Co.*, 8 Barb. 541; *Ogdensburgh, etc., R. R. Co. v. Vermont, etc., R. R. Co.*, 16 Abb. N. S. 249.)

Under the second subdivision of section 488 the question is as to whether the court has power to entertain controversies of the character of that described in the complaint under examination. (*Dodge v. Colby*, 108 N. Y. 445.)

Subdivision 3 concerns the plaintiff's capacity to bring the suit. If the action be brought in his own right by a person *sui juris* no question as to capacity to sue can arise.

Such a question arises, for instance, where it appears on the face of the complaint that the plaintiff sues as executor or administrator without alleging the facts showing his authority (*Secor v. Pendleton*, 47 Hun, 281), or where a foreign executor sues. (*Robbins v. Wells*, 18 Abb. 191.)

Where a corporation sues the proper practice is to allege

the fact of incorporation in the complaint, but if such an allegation be omitted it has been held that the complaint is not demurrable for that reason. (*Phœnix Bank v. Donnell*, 40 N. Y. 410.)

Subdivision 4 concerns another action pending involving the same question between the same parties.

The principle is the prevention of unnecessary litigation. If the controversy between the parties is already before a court of competent jurisdiction, it may not be made the subject of another action, and if the fact of another action appears upon the face of the complaint, it is demurrable, provided the other action is between the same parties and one in which the same relief is obtainable. (*Groshon v. Lyon*, 16 Barb. 461; *Geery v. Webster*, 11 Hun, 430; *Dawley v. Brown*, 79 N. Y. 390; *Dambman v. Schulting*, 4 Hun, 50.)

Subdivisions 5 and 6 concern the case of too many plaintiffs or too few plaintiffs or defendants.

A misjoinder of plaintiffs occurs, for instance, where a person is joined as plaintiff who has not a joint interest with the others. (*Berney v. Drexel*, 33 Hun, 419.)

It will be observed that the case of *too many* plaintiffs alone is indicated for ground of demurrer. It is no ground that there are too many defendants. (*N. Y. & N. H. R. R. Co. v. Schuyler*, 17 N. Y. 592.)

Subdivision 7 concerns the case of misjoinder of causes of action.

Such a defect exists where two or more different causes of action are joined in one complaint regardless of the restrictions upon that practice provided in section 484. A demurrer under this subdivision is a proper remedy where causes of action are improperly joined even though they are not separately stated and numbered. (*Goldberg v. Utley*, 60 N. Y. 427.)

Subdivision 8 concerns the defect most frequently in practice stated as ground for demurrer, namely, that no cause of action is alleged in the complaint. Every cause of action

is made up of a group of essential facts. If allegations of all or any of these facts be omitted from the complaint it is upon its face open to the criticism that it does not contain facts sufficient to constitute a cause of action. The question which arises upon such a demurrer is, "Suppose the plaintiff can prove all that he has alleged, or that we admit all that he has alleged in his complaint, is he entitled to any judgment against the defendant?"

If this question, in any given instance, be answered in the affirmative, the demurrer must be overruled; if in the negative, it must be sustained. (*Pierson v. McCurdy*, 61 How. Pr. 134; *Marie v. Garrison*, 83 N. Y. 14.)

It follows from the breadth of this principle that imperfection or informality of statement will not render a complaint demurrable under this subdivision, if some cause of action be shown, even though the relief demanded be inappropriate. (*Milliken v. Western Union Tel. Co.*, 110 N. Y. 403; *Wetmore v. Porter*, 92 N. Y. 76; *Emery v. Pease*, 20 N. Y. 62; *Parker v. Pullman*, 36 App. Div. 208.)

Where a cause for demurrer under subdivisions 1 to 7 exists it cannot be taken advantage of under subdivision 8. Only the statement of facts constituting a cause of action can be questioned upon a demurrer under subdivision 8. (*Irving Nat. Bank v. Corbett*, 10 Abb. N. C. 85; *Van Zandt v. Van Zandt*, 26 St. Rep. 963.)

89. The form of demurrer is prescribed by section 490.

If the defect for which the demurrer is interposed be want of jurisdiction either of defendant or subject-matter; or that another action is pending; or that the complaint does not state a cause of action, the objection may be specified in the language of the first, second, fourth or eighth subdivisions of section 488. If the defect relied upon be incapacity to sue, misjoinder or defect of parties, or improperly joining different causes of action, it must be *specifically* pointed out. If these directions as to form be not complied with, the demurrer "may be disregarded," that is, treated as a nullity, and judgment entered for default in pleading.

90. **Demurrer and answer together** can of course never be used where the complaint contains the statement of but one cause of action.

Where it contains more than one, and one of them is demurrable, the proper practice is to serve a demurrer to the cause of action which is, for any demurrable reason, defective; and to serve an answer to the remaining causes of action. (§ 492, Code Civ. Proc.)

91. **Amendment after demurrer.**—When a judgment is rendered upon the issue of law raised by a demurrer, the result is always an adjudication that one party or the other has made a mistake in his pleading. If the demurrer to a complaint be sustained, the result is an adjudication that the complaint is bad; if the demurrer be overruled, the adjudication is that *it* is bad. Complete power is given either to the court of first instance, or to any appellate court before which the question comes, to relieve the party at fault from the consequences of his mistake.

For instance, if a demurrer to a complaint be sustained, leave may be given the plaintiff to serve an amended complaint; if the demurrer be overruled, leave may be given the defendant to withdraw it and serve an answer in its place.

Were it not for this power reserved to the court, the decision of a demurrer would determine the action.

Permission so to amend or withdraw is invariably given except where it is evident that the demurrer has been interposed in bad faith, or where it is evident that no different case will be presented by amendment. (*Snow v. Fourth Nat. Bank*, 7 Robt. 479.)

92. Where defects enumerated in section 488 do not appear in complaint, but are claimed to exist in fact, the defendant must allege them in his answer, if he wants to raise the question at all. This is the rule as to the subjects of all the subdivisions of section 488 excepting the second and eighth.

93. Such a question must be raised by the appropriate method of pleading or be deemed waived.— That is, for in-

stance if the defendant claims that the court has no jurisdiction of his person, or that the plaintiff has not legal capacity to sue; or that there is another action pending; or that there is a misjoinder or defect of parties, or an improper joining in one complaint of different causes of action; and such defect is apparent on the face of the complaint, the question can be raised only by a demurrer to the complaint; while, if, in either of such cases, the defect is not apparent on the complaint, but is claimed by the defendant to exist in fact, the question can be raised only by answer.

Concerning the two excepted instances, of lack of jurisdiction of subject-matter or insufficient statement of a cause of action, the defendant may at any time raise the question regardless of the pleading which he has adopted. (Code Civ. Proc., § 499; *Zabriskie v. Smith*, 13 N. Y. 322; *De Bussierre v. Holliday*, 4 Abb. N. C. 111; *Nethercott v. Kelly*, 57 N. Y. Super. 27; *Hoffman v. Wight*, 137 N. Y. 621, affg. 51 St. Rep. 199.)

94. The answer.—If a defendant desires to dispute the facts of a plaintiff's complaint or bring into the case any additional fact relevant to his defense, he must do so in an answer.

The complaint contains the allegations of the plaintiff's cause of action; the answer, the allegations of the defendant's defense.

Leaving out of consideration for the present, for the sake of simplicity, the subject of counterclaim, an answer must contain denials, new matter, or both, and the two subdivisions of section 500 are drawn accordingly.

95. First principle of an answer—Deny whatever you don't want to admit.—As under the principle expressed in section 522 of the Code, whatever material allegation in the complaint is not controverted must for the purposes of the action be taken as true, the first, simple, and plain rule of pleading connected with drawing the answer is to deny whatever you don't want to admit, and to make the denial plain and unequivocal.

96. Argumentative denial insufficient.—A denial means a direct contradiction of an averment made in the pleading answered and not a mere inconsistent statement from which a denial may be argued. (*Fleischmann v. Stern*, 90 N. Y. 110; *West v. American Exchange Bank*, 44 Barb. 175; *Berry v. Rowley*, 11 App. Div. 396; *Notes on Denial*, 14 Abb. N. C. 319, 15 Abb. N. C. 269; *Forgotston v. McKeon*, 14 App. Div. 342.)

97. General and specific denials.—A general denial includes within its scope all of the allegations constituting a cause of action, while a specific denial includes a part only of such allegations. When anything less than the whole complaint is to be denied care should be taken to *specify* the particular allegations and then deny them in such plain fashion that there can be no doubt or question as to what has been denied. (*Baylis v. Stimson*, 110 N. Y. 621; *Clark v. Dillon*, 97 N. Y. 370.)

98. Forms of denial.—There are three methods of denial recognized in Code practice.

1. Unqualified denial.
2. Denial upon information and belief.
3. Denial of any knowledge or information sufficient to form a belief.

The first form may be used in cases where the person verifying the answer is willing to take the responsibility of denying absolutely and under oath upon his *knowledge* of the transaction.

The second form is used where the person verifying the answer has insufficient personal *knowledge* to enable him to take such responsibility, but has information from which he derives a belief in the denial.

The third form is used where the person verifying the answer has neither knowledge nor information sufficient to form a belief concerning particular allegations, which he does not want to admit, but desires to put in issue. (Code Civ. Proc., § 500.)

The propriety of denying upon information and belief

has been held in *Bennett v. Leeds Manufacturing Co.*, 110 N. Y. 150; *Brotherton v. Downey*, 21 Hun, 436.

When the third form of denial is used the phraseology of the statute should be followed; that is, the defendant should deny that he has any knowledge or information sufficient to form a belief. (*Lloyd v. Burns*, 38 N. Y. Super. 423; *affd.*, 62 N. Y. 651.)

99. To raise an issue, facts and not conclusions should be denied.—As in a complaint, allegations of fact are essential, and their place will not be taken by mere conclusions; so, in an answer, denial of a conclusion raises no issue. (*Emery v. Baltz*, 94 N. Y. 408.)

100. Denials and new matter.—When an answer is drawn, care should be taken to present the defense which upon the trial will be relied upon. If such defense rest in whole or in part upon a dispute of the plaintiff's allegations, it may be presented under an answer which simply denies the plaintiff's allegations in that behalf; but if the defense depends upon some additional fact not within the scope of plaintiff's allegations and defendant's denials, it should be set forth in the answer.

Under every logical system of pleading the defendant must, under a general denial, be permitted to controvert by evidence everything which the plaintiff is bound in the first instance to prove to make out his cause of action. (*Griffin v. Long Island R. R. Co.*, 101 N. Y. 348.)

So, in an action on contract, it is always open to the defendant, under a general denial, to prove any contract different from that alleged in the complaint. (*Miller v. Insurance Co. of N. A.*, 1 Abb. N. C. 470 and note; *Koehler v. Adler*, 91 N. Y. 657; *Field v. Knapp*, 108 N. Y. 87.)

But a defense founded upon new matter may not be established under an answer containing merely a general denial. (*McKyring v. Bull*, 16 N. Y. 297.)

For instance, the defenses of discharge in bankruptcy, payment, award, and the like must be specially pleaded in the answer. (*Cornell v. Dakin*, 38 N. Y. 253; *Bassett v. Led-*

erer, 1 Hun, 274; *Brazill v. Isham*, 12 N. Y. 9; *Crane v. Powell*, 139 N. Y. 379.)

101. An answer may contain more than one defense.—

Express authority is given in section 507 for a defendant to set forth in his answer as many defenses "as he has." Where he avails himself of this privilege care should be taken to state his defenses separately and to number them. Each defense should be complete in itself, although it is permissible to avoid repetition of statements by referring in one defense to the statements contained in another. Under this section a defendant may plead inconsistent defenses, with the limitation, however, that an election will be compelled between defenses wholly at variance with each other, where if one be true the other must necessarily be false. (*Bruce v. Burr*, 67 N. Y. 237; *Breunich v. Weselman*, 100 N. Y. 609.)

So, it is permitted, in actions on contract, to couple general denials with pleas of infancy or release. (*Mott v. Burnett*, 2 E. D. Smith, 50; *Kellogg v. Baker*, 15 Abb. Pr. 286.) In an action of slander to join a defense denying the speaking of the alleged slanderous words with one averring their truth; and in an action to recover for malicious prosecution to couple a general denial with defense of probable cause. (*Buhler v. Wentworth*, 17 Barb. 649; *Radde v. Ruckgaber*, 3 Duer, 684.)

And so, it is held that the rule of common-law pleading that pleas in abatement and in bar must be separately pleaded, no longer exists, and that under the Code both may be joined in one answer. (*Hamburger v. Baker*, 35 Hun, 456.)

102. Counterclaims.—The possible material for an answer thus far considered has consisted of denying allegations and defensive allegations of new matter. It is permitted to a defendant, also, within certain definite limits, to assert an independent claim against the plaintiff in the answer to plaintiff's complaint, and to meet the plaintiff's attack by a counter-attack asserted in a counterclaim. The Code regulations concerning counterclaims are designed to permit them

where no confusion will result in the trial or judgment. (See note on Counterclaim by M. H. Throop, in 3 Civ. Proc. Rep. 212; *Vassear v. Livingston*, 13 N. Y. 248.)

Counterclaims are a means by which more than one controversy between the same parties may be disposed of in one action. A defendant is never obliged to plead a counterclaim. He is always at liberty to bring an independent suit upon his cross-demand, but if he asserts a right of action against the plaintiff, which comes within the terms of sections 501 and 502, he is permitted to plead it as a counterclaim in his answer. He cannot, of course, bring an outside action and also use the same matter for counterclaim, but must do either one thing or the other.

103. Limitations upon counterclaims.—1. The counterclaim “must tend, in some way, to diminish or defeat the plaintiff’s recovery.” If the plaintiff’s suit be to recover money, any counterclaim measurable in money will of course tend to defeat or diminish the plaintiff’s recovery. If, however, the plaintiff seeks judgment for equitable relief, a counterclaim cannot be used which would result in an independent judgment against the plaintiff. (*Lipman v. Jackson Architectural Iron Works*, 128 N. Y. 58.)

2. In order to be available as a counterclaim the defendant’s right against the plaintiff must have been in existence at the commencement of the action. (*Mayo v. Davidge*, 8 St. Rep. 844; *Moody v. Steele*, 3 St. Rep. 269.)

3. Where the plaintiff sues in contract, a cause of action upon any other contract may be counterclaimed by defendant. (Subd. 2, § 501.)

Under this rule, where a state of facts exists under which the defendant has a right of election to sue either in contract or tort against the plaintiff, he may waive the tort and set up the breach of contract as a counterclaim. So, in the case where an agent converted property of his principal which he had agreed to account for, the latter waived the tort and in an action against him pleaded as a counterclaim the breach of contract. (*Coit v. Stewart*, 50 N. Y. 17.)

In an action of tort there can be no counterclaim unless it may fall within the class next mentioned.

4. In every case whether real or personal, in tort or in contract, a cause of action in favor of defendant and against plaintiff arising out of the same transaction set forth in the complaint, or connected with the subject of the action, may be counterclaimed. (See *People v. Dennison*, 84 N. Y. 272; *Carpenter v. Manhattan L. Ins. Co.*, 22 Hun, 49; *Bradhurst v. Townsend*, 11 Hun, 104.)

104. Counterclaim to be designated as such.—If any of the matter of an answer is intended to be pressed as a counterclaim, it should be called a counterclaim. (*Equitable Life Assur. Soc. v. Cuyler*, 75 N. Y. 511; *Acer v. Hotchkiss*, 97 N. Y. 395.)

105. Counterclaim with reference to parties.—The general principle is that the counterclaim shall affect only the same parties as are affected by the cause of action; that is, if A. sue X., the latter may plead a counterclaim which he has against A., but not one which he has against A. and B. jointly, nor one which he jointly owns with Y.

The one case in which one of several defendants sued together may assert an individual counterclaim is where the action is brought upon an obligation joint and several. (Code Civ. Proc., § 501; *Atwater v. Spader*, 12 St. Rep. 506; *St. Michael P. E. Ch. v. Behrens*, 1 St. Rep. 627; *Hopkins v. Lane*, 87 N. Y. 501.)

106. Counterclaims in cases where plaintiff sues upon an assigned claim.—It is a general principle (subject to some few exceptions) that a person having a right to sue another may transfer his right to some one else and the latter may then bring the action. In such case, however, the assignee of the right of action takes it subject to the burden of any defenses existing between the original parties. He also takes it subject to any counterclaim that may exist in favor of the defendant and against his assignor, under the provisions of Code Civ. Proc., § 502. For instance, if A., having a right of action on contract against X., assigns the right to B.,

who brings an action, X. may assert in his answer to B.'s complaint any counterclaim which he has against A., as well as any which he has against B. He cannot, however, in such a case assert any larger claim against A. than suffices to meet the demand upon which he is sued. An assignee of a claim should give notice to the debtor. (*Faulknor v. Swart*, 55 Hun, 261.)

107. Counterclaim, where plaintiff sues in a representative capacity.—In such case the defendant cannot counterclaim for a demand against the plaintiff individually, but may for a demand against the real party in interest. (Code Civ. Proc., § 502, subd. 3, §§ 505-506.)

108. Verification of answer.—The safe rule of practice is always to have the answer verified whether the complaint be verified or not. The principles of verification are the same as those already considered.

109. Demurrer to answer.—If a defense or counterclaim be “insufficient in law, *upon the face thereof*,” it may be demurred to. There are other grounds upon which it is possible to demur to a counterclaim, namely:

1. That the court has not jurisdiction of the subject thereof.

2. That the defendant has not legal capacity to recover upon the same.

3. That there is another action pending between the same parties for the same cause.

4. That the counterclaim is not of the character specified in section 501 of the Code.

5. That the counterclaim does not state facts sufficient to constitute a cause of action. (Code, §§ 494-495.)

110. The reply.—Ordinarily the pleadings end with the answer. An allegation of new matter in the answer is to be deemed controverted by the adverse party, by traverse or avoidance, as the case requires. (Code Civ. Proc., § 522.) This statutory provision takes the place of any further pleading. There is but one case where a further pleading is, as a matter of course, required, namely, where the answer con-

tains a counterclaim. A counterclaim involves, as we have seen, an independent demand asserted by the defendant against the plaintiff. The plaintiff's defense to such a counterclaim must be pleaded in a responding pleading called a reply. The statutory rules respecting this last-named pleading are, so far as applicable, similar to those already considered with reference to the defendant's answer. The reply in its substance is the plaintiff's answer to the defendant's counterclaim. It must not be inconsistent with the complaint, and may contain a denial in either of the forms permitted in the answer, or may set up new matter in avoidance. (Code Civ. Proc., § 514.) If a counterclaim be defective on its face, in any of the particulars mentioned in Code Civ. Proc., § 495, the plaintiff may, as we have already seen, demur to it; but if no such ground be apparent, the plaintiff must, if he would avoid a judgment by default against him upon the counterclaim, serve a reply. (Code Civ. Proc., § 515.) Where a counterclaim has been pleaded as such and a demand thereupon made for judgment in defendant's favor, a reply thereto is therefore necessary, while on the other hand where matter which might have been pleaded as a counterclaim is only set up in defense as a set-off, a reply is unnecessary. (*Leslie v. Leslie*, 11 Abb. Pr. N. S. 311; *American D. & I. Co. v. Staley*, 40 N. Y. Super. 539.)

III. Reply by order.—Power is reserved to the court, in any case where new matter of avoidance is contained in the answer, to direct a reply. This power is discretionary, and may be invoked only on defendant's application. A motion for such a purpose is made where a defense rests upon new matter, and it is desirable to narrow the issues to be tried. (Code Civ. Proc., § 516; *Cavanagh v. Oceanic Steamship Co.*, 30 St. Rep. 532; *Hartford Nat. Bank v. Beinecke*, 15 App. Div. 474.)

III. Formal requirements for all pleadings.—They must be subscribed by the attorney (Code Civ. Proc., § 520); they must be folioed (Rule 19); must be indorsed with the title

of the action (Rule 19); and indorsed with attorney's name and office address. (Rule 2.)

Defects in these particulars are waived unless the paper be returned within twenty-four hours after its receipt, with a statement of the particular objection to its receipt. (Rule 19.)

113. Time for service of pleadings.—Each party has a period of twenty days in which to respond to the preceding pleading of his adversary. (Code Civ. Proc., § 520.)

114. Service of answer on codefendant.—It is possible, under certain conditions, in suits in equity for a contention to arise between defendants, and for one defendant to assert in his answer a demand for a determination against a codefendant. In such case the answer must be served not only on plaintiff's attorney, but also on the codefendants or their attorneys. (Code Civ. Proc., § 521.)

115. Extension of time to plead.—If an attorney is not able to prepare his pleading for service within the twenty-day period, he may procure an enlargement of his time either by stipulation or by order. It is usual among attorneys to serve each others' convenience to any reasonable extent, by consent. All agreements respecting proceedings must be in writing. (Rule 11.) A stipulation extending time should be so drawn as to accomplish beyond question the extension required; for example, if it be desired to keep open the time to demur, as well as to answer, or to make a motion to make more definite, or to strike out, the stipulation should be framed accordingly.

116. Extension by order.—To procure an extension of time to plead, otherwise than by stipulation, it is necessary to present certain proofs by affidavit, and upon these to procure and serve an order.

a. Elements of affidavit or affidavits. There should in the first place be proof of a meritorious defense, in the shape either of an affidavit of merits or the substitute for it provided in Rule 24 of the General Rules of Practice.

An affidavit of merits is an affidavit by the defendant to

the effect that he has fully and fairly stated the case to his counsel (naming him and giving his place of residence), and that he is advised by such counsel after such statement that he has a good and substantial defense upon the merits to the cause of action set forth in the complaint. (Rule 23, Rules of Practice; *Cannon v. Titus*, 5 Johns. 355.)

For the purpose now under consideration the attorney may make a similar affidavit. In addition to the affidavit of merits or its substitute, it must also be shown by affidavit what is the cause of action and relief demanded in the complaint, whether any and what extension or extensions have been had either by stipulation or order; the facts showing the reason for the application, and the statement whether any previous application for the order has been made. (Code Civ. Proc., § 781; Rules 24 and 25, Rules of Practice.)

b. The order may be made either by the court or a judge, and should be drawn to cover the same points already mentioned with respect to the stipulation.

c. Service of copies of the affidavit and order should be made on plaintiff's attorney. (Code Civ. Proc., § 782.)

117. Frivolous and sham pleadings.—The ordinary method of procedure to judgment, as we shall see, is a regular trial in court of the issues raised by the pleadings. If an answer or demurrer be what is called "frivolous," or if an answer be "sham," the Code provides a short cut to judgment without waiting for a regular trial. It is obvious that this short cut can only be permitted in cases where the pleading is plainly condemnable for one or the other of the causes mentioned. Whenever the question is doubtful, the issues must be tried in the ordinary way.

118. A frivolous pleading is one which denies no allegation of the preceding pleading and which contains no defense, and which upon its face appears to be beyond all question insufficient, and so palpably bad as to require no argument or illustration to show it to be so. (*Strong v. Sproul*, 53 N. Y. 497.)

If there is any doubt on the subject, or any room for argu-

ment a pleading will not be held to be frivolous. (*Carpenter v. Adams*, 34 Hun, 429.)

So, in the case of a demurrer, unless it appears to be indisputably and clearly without foundation, judgment upon it as frivolous will not be ordered. (*Cook v. Warren*, 88 N. Y. 37.)

119. Motion for judgment upon frivolous pleading.—If demurrer, answer, or reply is frivolous, the party prejudiced may, upon not less than five days' notice, move for judgment thereupon. (Code Civ. Proc., § 537.)

In such case the motion is made simply upon the pleading alleged to be frivolous. It is both unnecessary and improper to use any affidavit, and the frivolous pleading is not stricken out but remains as a part of the judgment-roll. If the court before which the motion is made is of opinion that the pleading is not plainly bad, but that something may possibly be said in its support, it denies the motion, and the trial is then brought on in the regular way, and no appeal from the order is permitted.

120. A sham answer or defense differs from a frivolous one in that the former is sufficient on its face but false in fact, while the latter is palpably insufficient. Motions to strike out sham pleas were known in common-law practice, and it has been held that the motion to strike out sham answers and defenses, provided in section 538, Code Civ. Proc., continues the common-law practice and is subject to like restrictions. Following the common law, the decisions under the Code hold that no matter of denial, however false, can be stricken out as sham, and that the remedy is confined to affirmative defenses, which are clearly established to be false in fact. (*Wayland v. Tysen*, 45 N. Y. 281; *Robert Gere Bank v. Inman*, 51 Hun, 97.)

Even in the case of affirmative defenses claimed to be false in fact, if there is any reasonable question as to the truth of the defenses, the court will not strike them out. It will not try a case on affidavits.

121. The order upon a motion on a sham answer directs

that it be stricken out, and judgment is then given as though there were no answer at all. (*First Nat. Bank v. Slattery*, 4 App. Div. 421.)

122. Motions to correct pleadings.—The more important defects in pleadings have been considered in connection with the subject of demurrers. A pleading may not be so bad as to justify a demurrer, and still be defective as a pleading. It may contain too much, when it is said to contain redundant matter, or there may be allegations irrelevant to the cause of action or defense; or the allegations may be so confused that the result is uncertainty.

When we revert to our main principle that a pleading is required mainly to give the adverse party information of the facts alleged to constitute a cause of action or defense, if it be defective in any of these particulars, it fails of its purpose, and it is proper for the adverse party to make a timely motion calling the attention of the court to the alleged defect, and asking that it be corrected. (§§ 545-546, Code Civ. Proc.; *Hale v. Omaha National Bank*, 49 N. Y. 626; *Post v. Blazewitz*, 13 App. Div. 124.)

In such case the motion is made upon the pleadings only, the notice of motion particularly specifying the defect sought to be corrected. It must be noticed before the time to plead has expired. (Rule 22, General Rules of Practice.)

123. Bills of particulars.—The last sentence of section 531, Code Civ. Proc., makes this provision:

“The court may, in any case, direct a bill of the particulars of the claim of either party to be delivered to the adverse party.”

This is all that is contained in the Code concerning this important matter or practice. The language is to be noted. The court *may* direct *either party* to furnish particulars to the other. Discretionary power is thus given to the court, and in a long line of decisions the limits within which the court will exercise its discretion have been generally indicated. It is impossible to accurately generalize these rules. Suffice it to say that if either party can present facts from

which it appears that he ought to have fuller information of the adverse party's claim than that given by the bare pleading, in order to enable him to plead, or to prepare for trial, the court will order the information to be furnished him, while, if on the hearing of such an application it appear that it is made in bad faith, or unnecessarily, or that to grant it would obstruct instead of aiding justice, it will be denied.

"The office of a bill of particulars is to amplify a pleading and indicate specifically the claim set up, while its effect is to restrict the proofs and limit the demand. It is neither given nor required for the purpose of disclosing to an adverse party the case relied upon, nor the proof to substantiate the same." (*Higenbotam v. Green*, 25 Hun, 216.)

Bills of particulars are not confined to actions concerning commercial transactions, or to actions on contract. They may be required in all sorts of actions and with reference to either cause of action or defense. (*Tilton v. Beecher*, 59 N. Y. 176; *Ball v. Evening Post Publishing Co.*, 38 Hun, 11.)

For a discussion of the principles upon which motions for particulars are decided, see *Dwight v. Germania Life Ins. Co.*, 84 N. Y. 493; *Wigand v. Dejonge*, 18 Hun, 405; *Pas-savant v. Cantor*, 21 Abb. N. C. 259; *Goddard v. Pardee Medicine Co.*, 52 Hun, 85.

124. Practice upon motions for bills of particulars.—These motions are usually made to assist in pleading, and, consequently before issue joined, although they may be made at any time before the trial, provided the opposing party is not prejudiced by laches.

The motions are made upon affidavit and notice of motion or order to show cause, and the affidavit must show the necessity for particulars, and the ignorance of the moving party of the particulars which he seeks.

125. Amendments of course.—The pleadings, as we have seen, constitute the allegations upon which the trial is planned. In our system of practice the fullest reasonable opportunity is given to parties to re-draft their pleadings in case of mistake or misinformation, and the principles which are applied

in motions for amendment will be considered later. In the early stages of the action the right is given to each party without any motion and as a matter of course, to amend his pleading once; that is, within a limited period, the plaintiff may interpose, in place of his original complaint, an amended complaint, which may differ either partially or completely from the original complaint, and in like manner the defendant may serve an amended answer. The only restriction upon this right is that it shall be exercised in good faith and not merely to delay the proceedings. (Code Civ. Proc., § 542.) The right to this amendment is confined to the pleadings, and does not extend to the summons. Hence no change of parties can be made under this section. This cannot be done without an order. But so long as there is no change in the parties, any other amendment may be made, either partly or completely changing the cause of action or defense. (*Brown v. Leigh*, 49 N. Y. 78.)

A defendant, under the privilege to amend of course, cannot substitute an answer for a demurrer, or *vice versa*. (*Cashman v. Reynolds*, 123 N. Y. 138.)

The period within which an amendment of course must be made is thus designated in section 542. "Within twenty days after a pleading, or the answer, demurrer, or reply thereto, is served, or at any time before the period for answering it expires, the pleading may be once amended of course," etc.

Where an amendment of this kind is made, the amended pleading is required to be served upon the attorney for the adverse party. Consequently if there has been no appearance by the defendant, the amendment must be by order and not of course. (*Durham v. Chapin*, 13 App. Div. 94.)

126. Supplemental pleadings.—An amended pleading takes the place of the original, while a supplemental pleading supplements or adds to the original, so that together they constitute the complete pleading. If a mistake is made in pleading facts, an amended pleading is used to correct the mistake, while if after an action is commenced new facts

arise affecting the rights of parties or the judgment to be rendered, a supplemental pleading is used to set forth the added facts. Section 544, Code Civ. Proc., is badly drawn, and without a clear view of this distinction, but in practice supplemental pleadings are used on the lines here indicated. (*Lovatt v. Watson*, 35 Hun, 553; *Farmers' L. & T. Co. v. United Lines Tel. Co.*, 47 Hun, 315; *Holly v. Graf*, 29 Hun, 443.)

Supplemental pleadings can be interposed only by order made upon motion.

127. Variances and summary amendments.— “*Secundum allegata et probata*” expresses one of the fundamental principles of the law of procedure. The pleadings must precede the proof and the proof must follow the pleadings. In common-law practice this entirely reasonable principle was strained to absurd results, and the most rigid conformity between proof and pleading was required. Under the reformed procedure the reasonable principle is still retained. It is still true that a plaintiff is required to prove the cause of action which he alleges, and not an entirely different one, and that a defendant is confined to the defense which he describes in his answer, but the Code, in the case of small differences in description between the thing alleged and the thing proved, permits the difference to be practically ignored. If, for instance, the transaction which is the subject of the action be described in the complaint with substantial though not absolute accuracy, the plaintiff will not fail because his proof turns out upon the trial not precisely as he has alleged the facts in his pleading; nor will he, in such a case, be driven to a motion to formally reconstruct and amend his pleading. In such a case “the court may direct the fact to be found according to the evidence, or may order an immediate amendment without costs.” (Code Civ. Proc., § 540.)

If, however, the misdescription in the pleading has misled the adverse party the summary amendment will not be ordered. In short, the rule is, misdescription of incidental matters will be ignored, while if it extend to the substance of

the cause of action or defense, the old principle is still applied that unless the proof follows the allegation it must fail. (Code Civ. Proc., § 541.)

Examples of immaterial variances are found in *Sussdorf v. Schmidt*, 55 N. Y. 319; *Ludlow v. Dole*, 62 N. Y. 617; *Cruger v. McLaury*, 41 N. Y. 219. And of failures of proof in *Catlin v. Gunter*, 11 N. Y. 368; *De Graw v. Elmore*, 50 N. Y. 1; *Bernhard v. Seligman*, 54 N. Y. 661; *Neudecker v. Kohlberg*, 81 N. Y. 296.

CHAPTER IV.

THE TRIAL AND ITS INCIDENTS.

128. **The issues.**— Whatever has been the course of pleading, the result is the raising of an issue or issues. The issues are the *differences* between the parties which have been developed in the pleadings. These differences may consist of matters of fact or disputes as to the law applicable to undisputed facts. Wherever facts are in dispute the result is an issue of fact. Where no facts are in dispute but the difference between the parties is as to the law, the result is an issue of law. An issue of law, then, can arise only upon a demurrer to some pleading, for in such case only is there no dispute as to the facts between the parties. If there be a demurrer to a complaint, as we have seen, the legal effect of the demurrer is to admit the facts of the complaint and to question merely its legal sufficiency. In like manner a demurrer to an answer admits the facts set forth therein. In either of such cases the demurring party does not question the facts. He raises the legal question that upon the facts *as pleaded* he is entitled to judgment. The adverse party disputes this legal conclusion. Hence, an issue of law. Where there is no demurrer, but the pleadings consist of complaint and answer, or complaint, answer, and reply, there is a dispute as to the facts either directly and in terms, or by virtue of the provisions of section 522, Code Civ. Proc., and such a dispute raises an issue of fact. (Code Civ. Proc., §§ 963 and 964.)

Whatever the character of the issues raised by the pleadings, whether they be of fact or of law, they must be regularly brought to trial, excepting only the issues raised by a frivolous pleading or sham defense which may be summarily disposed of in the manner already mentioned. (Code Civ. Proc., § 965.)

It is possible in one action to have both kinds of issues, viz.—of fact and of law; for instance, where a complaint contains two distinct causes of action and the defendant demurs to one and answers the other, or where an answer contains two defenses and one of them is demurred to. In such cases the demurrer is required to be first disposed of. (Code Civ. Proc., § 966.)

And it is also possible for entirely distinct issues of fact to arise in one action, as for example, where two defendants are sued and they put in separate answers differing in character. In such cases, which are not common, power is reserved to the court, to direct separate trials. (Code Civ. Proc., § 967; *Gurnee v. Hoxie*, 29 Barb. 547.)

129. **Trial tribunals** may consist of a judge and jury, or a judge sitting alone, or a referee, depending upon the character of the issue and the action of the parties.

130. **Trial by jury.**— The provisions of the Code concerning this subject must be read in the light of the following provision contained in the State Constitution:

“The trial by jury in all *cases in which it has been heretofore used*, shall remain inviolate forever; but a jury trial may be waived by the parties in all *civil* cases in the manner to be prescribed by law.” (§ 2, art. I, Constitution of N. Y.)

The general line of division between cases where a jury trial is matter of right and those in which it is not, is that the right exists in common-law cases and does not in equity cases. The institution of trial by jury came to us as a part of the common law itself, and has been preserved as a constitutional right in the provision above quoted. In the system of equity jurisdiction which grew up in the Court of Chancery the jury was not an element. As our Supreme Court combines in itself both jurisdictions, in equity as well as in law, juries are used on the law side of the court but not on the equity. The cases designated in subdivision 1 of section 968, Code Civ. Proc., are therefore actions at law. Consequently if an action be in its nature *equitable*, although the judgment demanded be for a sum of money only, it is not a

case where trial by jury is matter of right. (*Bell v. Merrifield*, 109 N. Y. 202; *Van Rensselaer v. Van Rensselaer*, 113 N. Y. 207.)

And so where a party elects to bring an action for both legal and equitable relief in respect to the same cause of action, the case is not one of right triable by jury. By the act of bringing an action for both kinds of relief he waives the right of trial by jury and submits to the course of trial in equity cases. (*Cogswell v. N. Y., N. H. & H. R. R. Co.*, 105 N. Y. 319.)

Whether an action is to be tried by a jury or by the court without a jury is to be determined by the complaint alone. A defendant by setting up an equitable defense to a legal cause of action cannot deprive the plaintiff of his right to a trial by jury.

In addition to the ordinary common-law actions there are two others in which the Constitution preserves the right of trial by jury, namely, actions in the nature of *quo warranto* to test the title to an office, and the issues of adultery in the action for divorce. (See *People v. A. & S. R. R. Co.*, 57 N. Y. 161; Code Civ. Proc., § 1757.)

Ordinary common-law actions are brought to trial upon the pleadings. In the other cases, just mentioned, questions are framed upon the pleadings and those questions submitted to the jury for their answers. The details of practice in framing and settling these questions are provided in section 970, Code Civ. Proc., and in Rule 31 of the General Rules of Practice. The verdict of a jury upon such questions is conclusive to the same extent as the verdict in ordinary actions at law.

131. Trial by jury—in other cases—for convenience, and not of right.—As we have seen, trial by jury is a right connected with common-law actions. In equity suits the method of trial which, from its foundation, was used in the Court of Chancery, was by the chancellor alone, who not only determined the law, but the facts as well. There was, however, at a remote period, devised a means, by which the

chancellor might obtain the assistance of a jury in passing upon disputed matters of fact. This means was by what was called a "feigned issue." Whether a feigned issue should be used was a matter entirely within the discretion and control of the chancellor. A jury could not be used directly in his court. When, therefore, in any chancery suit, a question of fact arose of such a character as to induce in the chancellor a desire to have a jury's assistance, an auxiliary action based upon a fiction would be commenced in a common-law court. The declaration in this auxiliary action would allege a wager between the parties in the chancery suit, as to the existence of the facts in dispute, and that the plaintiff's contention of the facts was the true one. The defendant in his plea would admit the wager and deny the plaintiff's version of the facts. This would put in issue in the common-law action the same facts disputed in the chancery suit, the facts would be tried in the common-law action by a jury, and the record of the verdict certified to the chancellor. Even in such cases, however, the verdict did not bind the chancellor. He might, if he thought such to be his duty, find the disputed facts differently from the verdict. As the very constitution of the tribunal over which he presided placed upon him the responsibility of deciding the facts, he could not shift this responsibility. He could use the jury, through the feigned issue, as an assistance but not as a substitute.

Under the reformed procedure we have no separate Court of Chancery. Its powers are exercised by the Supreme Court, but the method of trial without a jury in equity cases is still continued, and the use of a jury in such cases as a matter of convenience only, is also still continued, but without the roundabout device of a feigned issue. This is explicitly abolished in section 823, Code Civ. Proc. In equity suits the court may now in its discretion direct issues to be framed and order them tried by a jury. In such cases — differing from those in which trial by jury is of right — the procedure is simply for the convenience of the court, and it is not bound by the verdict. It may use it or not, wholly in its discretion.

(Code Civ. Proc., § 971; *Learned v. Tillotson*, 97 N. Y. 1; *Acker v. Leland*, 109 N. Y. 5.)

132. Trial by the court, without a jury.— There are three classes of cases where the trial is conducted without a jury, viz.: Issues of law; issues of fact in equity cases; and issues of fact in other cases where the right of trial by jury has been waived.

1. *Issues of law.* As these arise only upon demurrers, and there are no facts in dispute, but simply questions of law upon undisputed facts, there is in such a dispute nothing for a jury to do. (Code Civ. Proc., § 969.)

2. *Issues of fact in equity cases.* These as we have seen are, for historical reasons, triable by court alone.

3. *Issues of fact in other cases.* Recurring to the constitutional provision preserving the right of trial by jury, the phrase will be recalled that “a jury trial may be waived in all *civil* cases in the manner to be prescribed by law.” The statutory modes of waiver are mentioned in section 1009, Code Civ. Proc., but they need not be dwelt upon, in view of the decisions of the courts to the effect that these methods are not exclusive, and that the same effect may be given to *any* evidence, either of conduct or acquiescence, by a party, which, in other cases, would require a conclusion that a right designed for his benefit had been waived. (*Mackellar v. Rogers*, 109 N. Y. 468.)

133. How trial is brought on.— Having thus sketched the trial tribunals, and the division of business between them, we now take up the practice in bringing the cause before the appropriate tribunal. The jury terms of the Supreme Court are designated Trial Terms; the parts in which all other business of the court is conducted are called Special Terms. The part of an action thus far considered has included simply the service of process and the interchange of the pleadings. Excepting possibly, the hearing of some incidental motion, the action has not been presented to the attention of the court in any way. Thus far the whole business of the action has been transacted in the offices of the attorneys. When the pleadings

are completed and served, the issues are ready for trial and either party may take the steps necessary to bring on the trial. These are very simple and consist in giving notice to the adverse party of the term and place where and when the trial will be moved, and notice to the clerk of the court of the same items together with such other information as will enable him to put the cause upon the proper calendar, in its proper place.

134. Notice of trial.— This notice may be served by either or both parties, at least fourteen days before the commencement of the term for which it is designated to place the cause on the calendar. If the issue be triable by a jury the notice is given for a Trial Term — if otherwise, for a Special Term. Trial Terms and Special Terms are held in each county of the State, with more or less frequency, depending upon the populousness of each locality and the consequent volume of business, and according to a designation prescribed and published under the directions of Code Civ. Proc., §§ 232–233. In New York county, for instance, there is a Trial Term and a Special Term commencing the first Monday of each month excepting July, August, and September, and such is the volume of business that several parts each of the Trial and Special Terms are constantly occupied. The notice of trial is to the following effect — if a jury case (Title of the Action):

“Take notice that the issue of fact in this action will be brought to trial and an inquest taken therein at a Trial Term of this court appointed to be held in and for the county of New York at the courthouse in the borough of Manhattan on the first Monday of January, 1904, at 10:30 o’clock in the forenoon of that day, or as soon thereafter as counsel can be heard.”

“.....,
“Plaintiff’s Attorney.”

“To,
“Defendant’s Attorney.”

The notice when served by the defendant’s attorney is precisely to the same effect excepting in place of the phrase “an

inquest taken " is substituted " a motion made to dismiss the complaint."

When the notice is served in an equity suit by the plaintiff, in place of the phrase " an inquest taken " there is substituted " an application made for the relief demanded in the complaint," and in place of " Trial Term," which, as has been explained, is for jury causes only, there is substituted " Special Term."

135. Note of issue.— This is a notice to the clerk containing such particulars as are necessary for him to know to put the cause in its proper place on the proper calendar, namely, the title of the cause, the names of the attorneys, the date of issue (*i. e.*, the service of the last pleading), and its character (whether of law or fact); whether the cause is triable with or without a jury, and the particular term for which it is noticed. This must be filed twelve days before the commencement of a term. In the counties, containing the large cities, one notice of trial and one note of issue are enough. In the other counties if a cause is not reached at the term for which it is noticed, new notices of trial and of issue have to be served and filed. (§ 977, Code Civ. Proc.)

136. Moving the cause for trial.— It is the duty of an attorney to keep himself familiar with the course of business in the courts in which he has causes pending, and to be present in court when a cause in which he is attorney is reached upon the calendar for trial. When it is so reached and called either party who has served the notice of trial may move the cause. If both parties are present and ready the trial proceeds in the regular way hereafter described. If either party fail to respond the adverse party may proceed in his absence — " taking his default "— as the phrase goes. If the defendant be present, or represented, and the plaintiff defaults, the defendant's attorney moves to dismiss the complaint, which motion is granted as a matter of course upon his producing his notice of trial with proof of service. (Code Civ. Proc., § 980.)

If the defendant fails to respond when the cause is called

for trial, the plaintiff's attorney may proceed and "take an inquest."

137. Practice on inquests in civil actions.—An inquest is a one-sided trial, in which the plaintiff makes the simplest *prima facie* proof of such facts constituting his cause of action as have been put in issue by the answer. The defendant's case is not gone into at all, he having neglected his right to produce testimony by his failure to appear. The plaintiff having presented in the briefest possible manner his proofs of the matters in his complaint denied in the answer, a verdict is directed for the sum proved to be due him, and judgment entered accordingly.

138. Inquest for want of an affidavit of merits.—In order to comprehend the present practice it is necessary to refer to that which preceded it. Formerly it was the rule of practice that in every action at law, the defendant, besides putting in his pleading, was required to file and serve an "affidavit of merits," that is, an affidavit to the effect that he was advised by his counsel that he had a meritorious defense. The purpose of this rule was to prevent the interposition of defenses merely for delay, and to that end to require some evidence of good faith by the defendant. The consequence of a failure by the defendant to file and serve an affidavit of merits, was that the plaintiff was permitted to call up the case out of its order at the beginning of the term for which it was noticed, and take an inquest in precisely the same manner as though the case had been regularly reached and the defendant had defaulted.

The present Code abolishes this general practice, but preserves it in the one case where the answer is not verified. The language of the statute is "An inquest for want of an affidavit of merits, cannot be taken where the answer is verified." (Code Civ. Proc., § 980; Rule 28, General Rules of Practice.)

139. Affidavit of merits.—As this affidavit must still be used, in the one case mentioned, to prevent an inquest, and as it is also required upon applications by the defendant to

extend his time to plead and for other purposes, some reference to the form of its well-settled and considered language is desirable. After title, venue, and introduction, it runs "That the defendant has fully and fairly stated the case to his counsel" (giving counsel's name and residence), "and that he has a good and substantial defense on the merits thereof as he is advised by his said counsel, after such statement made as aforesaid, and verily believes to be true." (*Cannon v. Titus*, 5 Johns. 355.)

Whenever an affidavit of merits is to be used it is not safe to indulge in any variation of this language.

140. The trial of a jury case — The jury.— A very considerable space in the Code of Civil Procedure is occupied with directions and regulations concerning the enrollment and drafting of citizens for service as trial jurors. These regulations are for the guidance of clerks, sheriffs, and commissioners, and ordinarily an attorney has no need to become acquainted with them. They are contained in sections 1027–1163, Code Civ. Proc. The object of these regulations is to procure lists of citizens of average ability, competency, and character to serve as jurors. Where a jury of special intelligence and extraordinary competency is required, provision is made in sections 1063–1071, for a special or "struck" jury. At every Trial Term of the court there are summoned from the lists a number of citizens to act as jurors for the term. When a case is called for trial, ballots containing the names of all jurors in attendance are placed by the clerk in a wheel or box. The clerk then draws, one at a time, ballots from the box. "The first twelve persons who appear as their names are drawn and called, and are approved as indifferent between the parties, and not discharged or excused, must be sworn, and constitute the jury to try the issue." (Code Civ. Proc., § 1166.) This is the process of "empanelling the jury."

141. Challenges to the jurors.— In ordinary civil cases counsel are usually contented to make the general inquiry of the twelve men whose names have been drawn, whether any of them are acquainted with the facts of the case or with

either of the parties or counsel, and, if no affirmative answer be given, to accept the jury. The right of challenge exists, however, in civil as well as in criminal actions, though it is used very much less in the first named. The possible challenges are:

1. *To the array*, that is, to the entire body of jurors in attendance, upon the ground of some irregularity in drawing the panel. This challenge is unused in civil cases, and seldom in criminal.

2. *For principal cause*, such as relationship, association in business, or the expression of an opinion upon the controversy to be tried — or anything of a similar nature, showing upon its face the disqualification to sit as an impartial juror.

3. *For favor*. Any circumstance indicating, though not conclusively, a prejudice or bias in favor of a party. Any question raised by either of these challenges is tried and determined by the court alone. (Code Civ. Proc., § 1180.)

4. *Peremptory*. That is, without the statement of any ground or reason. Each party in a civil action has the right to six peremptory challenges. (Code Civ. Proc., § 1176.)

142. Opening the case.—It is to be borne in mind that neither judge nor jury know anything about the case which they are organized to try. The first step in the trial is to give them some information of the outline of the controversy. To that end it is required that the party moving the cause for trial (presumably the plaintiff) shall furnish a copy of the pleadings in the case to the court. (Code Civ. Proc., § 981.) For like information to the jury, *the party holding the affirmative of the issue* has the right to make an opening address. Ordinarily this is the plaintiff, but where the defendant's answer admits all the allegations in the complaint necessary to be established to make out a cause of action, and sets up an affirmative defense, the defendant has the affirmative of the issue, and the right to open and close the case. (*Murray v. N. Y. Life Ins. Co.*, 85 N. Y. 236.)

The right to open and close carries with it the corresponding obligation upon the party holding the affirmative to sat-

isfy the jury, by a preponderance of evidence. of the facts upon which his case depends. If he fails to do this, the opposite party is entitled to a verdict. (*Cranston v. N. Y. C. & H. R. R. Co.*, 103 N. Y. 614.)

The limits of an opening address are indicated by its purpose, which is a statement of the nature of the action — the substance of the pleadings, the points in issue, and the substance of the evidence which it is designed to offer. A clear, brief, well-arranged opening address is of great assistance to the jury in understanding the application of the evidence which follows.

143. Motion to dismiss upon pleadings and opening.— At this stage of the trial this motion may be made upon two grounds only:

1. That no cause of action is alleged; or
2. That the court has no jurisdiction. (*Code Civ. Proc.*, § 499.)

144. Putting in evidence by plaintiff.— This consists of the oral examination of plaintiff's witnesses, the reading of any depositions which may have been taken upon commission or under order, and the proof of documentary evidence.

The plaintiff is required, as a general rule, to present *all* of the testimony in support of *his* case before he rests, that is, not to hold in reserve any part of his testimony excepting such as may properly be offered in rebuttal of the defendant's case, but this, as well as the order of proof, are matters entirely within the discretion and control of the trial court. It is also within the court's discretion to limit the taking of testimony to reasonable bounds where irrelevant or cumulative testimony upon an uncontroverted point is offered.

Whether the testimony to be drawn out is competent, relevant, and material must be determined, as questions arise, by an application of the principles of the law of evidence.

If a question is asked which the defendant's counsel deems objectionable, the objection must be interposed then and there — before the question is answered — although, of course, his rights are not affected by an answer made so

quickly as to prevent his getting in his objection. In such case the proper practice is to move to strike out the answer. But if improper testimony get into the case without objection being made promptly, the party aggrieved may not afterwards move to strike it out. (*Matter of Morgan*, 104 N. Y. 74.)

If it is desired to object to a question the objection must be interposed when the question is asked, and the grounds therefor stated. For instance, a question is put a witness by plaintiff's counsel which his adversary deems objectionable. The defendant's counsel addresses the court—"Question objected to on the ground that it is incompetent, irrelevant, and immaterial" (or any other pertinent ground). If the judge deems the objection well founded he sustains it, and rules out the question. Then, if the plaintiff's counsel wishes to retain the right to question this ruling at any future time, he must *then and there* except. If he does not, his right to review that particular ruling is gone. He takes an exception by simply saying so that the judge may hear him "I except," or "please note my exception." The exception is then noted upon the minutes of the trial. If, in the case supposed, the judge deems the question proper, he overrules the objection and directs the witness to answer. Then the defendant's counsel excepts.

After the plaintiff's counsel has completed the examination of his first witness, the defendant's counsel has the right of cross-examination. In this, there are two general lines of inquiry: first, relating to the witness's statements on his direct examination and other relevant facts; and, second, questions to test the witness's accuracy or credibility. Only the general rule need here be stated, which is that so far as the cross-examination of a witness relates to facts in issue, or relevant facts, it may be pursued by counsel as matter of right, but when the object is to test the accuracy or credibility of the witness, its method and duration are subject to the discretion of the court, and the exercise of this discretion, unless it is abused, is not the subject of review. (*Langley v. Wadsworth*, 99 N. Y. 61.)

The plaintiff's counsel then produces and examines his other witnesses, and they are cross-examined in their order, and from time to time, puts in evidence such documentary evidence as he has, having each paper or document properly marked as an exhibit, by letter or number, so that there can be no subsequent question of their identity. The mark may be made by the judge, or, under his direction, by the stenographer.

145. At close of plaintiff's case he rests.—It then becomes the duty of the defendant's counsel to proceed. If he thinks there is a possible chance of maintaining the position that the plaintiff has failed to make out a case, he may here move to dismiss the complaint.

The motion for a nonsuit at the close of the plaintiff's case is very much in the nature of a demurrer to evidence. The motion is based upon the theory that the plaintiff has failed to establish by evidence a cause of action against the defendant. In disposing of the application, no question as to the truth of the testimony offered by the plaintiff is raised. It is assumed to be true. The analogy to the situation which arises to the demurrer in pleading is quite close. There the contention is: "Assuming to be true all you have alleged, you have stated no cause of action;" while upon the motion to dismiss it is: "Assuming all you have proven, to be true, you have established no cause of action." Upon this motion the court will construe the evidence in the light most favorable to the plaintiff, and will not grant the motion unless, even under its most favorable construction, the evidence falls short of establishing a cause of action.

146. The grounds of the motion to dismiss must be stated.—The defendant must point out accurately and precisely the grounds upon which he requests a dismissal. (*Wilcox Silver Plate Co. v. Green*, 72 N. Y. 17; *Falk v. Beeckman*, 18 St. Rep. 1018.)

147. Upon the decision of the motion to dismiss, an exception must be taken by the party against whom the de-

cision is made, in order to avail himself of his right to have the decision reviewed.

148. The effect of the granting of the motion to dismiss is that it ends the trial. Such a determination operates as at common law, *i. e.*, it is simply that upon the proofs as presented the plaintiff cannot recover. It does not prevent the bringing of another action for the same cause, nor the recovery upon a second action if the plaintiff can better his proofs. (*Vide* § 1209, Code Civ. Proc.)

149. Withdrawing a juror.— It may be, in the course of a trial, that the plaintiff's attorney finds his proofs in such unsatisfactory condition that he would like, if he could, to discontinue the trial. In this way he could perhaps avoid an adverse result which would otherwise be inevitable. The only way in which a jury trial can break down when once commenced is through the breaking down of the machinery of the court. If the jury becomes incomplete, for instance, through the death or illness of a juror, the trial comes to naught, and is commenced *de novo* at some future day. An application to withdraw a juror is therefore an application, through the destruction of the complete jury, to discontinue the trial, and begin it over again. Such an application is presented to the discretion of the judge presiding at the trial, and should he think the situation of the plaintiff's attorney excusable, he would grant it and so end the trial. (*People ex rel. Perkins v. Judges of Common Pleas*, 8 Cow. 127.)

150. If the motion to dismiss be denied the defendant presents his case in the same manner as the plaintiff, through an opening address, and the production of his proofs.

151. After defendant rests, plaintiff may put in evidence in rebuttal, but it is within the discretion of the trial justice whether, outside of matter strictly in rebuttal, there shall be any further examination of witnesses.

152. Motions at close of testimony — Provinces of court and jury.— At the close of the testimony a motion to direct a verdict may possibly be made by either party or by both parties. A proper understanding of the principle determin-

ing the decision of a motion to direct a verdict is dependent upon a knowledge of the functions of court and jury.

It is the province of the court (*i. e.*, the judge who presides at the trial) to determine all questions of law which arise in the course of a trial and to apply the law to all undisputed facts, while the jury must determine all *disputed* facts, that is to say, such material facts of the controversy as to which the evidence is conflicting. So if there be no substantial conflict in the evidence there is really nothing for the jury to do. It is for the judge to declare the law applicable to the established facts, and to direct judgment accordingly. In form he accomplishes this result by directing the verdict. If, therefore, upon the whole case, the defendant wishes to make the contention that the plaintiff is not, on the undisputed facts, entitled to recover, he makes a motion that the court direct a verdict in his favor. If the court agrees with the defendant's contention, the motion is granted, a verdict is directed in defendant's favor, and the trial ends.

So, if at the close of the testimony the plaintiff contends that upon the undisputed facts he has made out his cause of action and the defendant has failed to establish a sufficient defense, he moves for a direction in his favor, which motion, if the court agrees with him, is granted.

If, in either of these instances, the party opposing the motion desires to have the case submitted to the jury, he must make a motion to that effect and except to its denial, if he wishes to review the decision in that particular.

It is not enough for him to except to the ruling upon the motion to direct a verdict — he must move affirmatively that the case be given to the jury.

Upon the disposition of a motion to direct a verdict, it is competent for either party to move to submit the case to the jury — even the party failing on the motion to direct, may do this.

It frequently happens that both sides make a motion to direct a verdict. This is tantamount to an agreement or stipulation that there are no questions of fact to be determined.

by the jury, but simply questions of law, and neither party may, in such case, on appeal, object that the case should have gone to the jury unless he made a timely motion requesting that disposition and stated the grounds for such motion. (*Provost v. McEncroe*, 102 N. Y. 650; *Ormes v. Dauchy*, 82 N. Y. 444; *Mayer v. Dean*, 115 N. Y. 556.)

153. The test used in determining motions to direct a verdict.—It is a general principle that a jury may not find a fact unsupported by evidence, nor may they find a fact against the overwhelming weight of testimony. Where there is any reasonable conflict of testimony it is within the province of the jury to determine the fact, and if there is evidence to support their finding it will not be disturbed, but, as we shall see, if the jury in rendering a verdict ignore these principles, the court has power to set aside the verdict. The general rule employed by the courts in disposing of motions to direct a verdict has hence been deduced, and is stated as follows in *Bulger v. Rosa*, 119 N. Y. 459:

“The general rule is well settled, that in a jury case the direction of a verdict is only justified where the evidence *conclusively* establishes the right of the party in whose favor the direction is given. The test of the right to direct a verdict is whether the court would be bound to set a verdict aside as against evidence, if rendered against the party in whose favor it was directed. If this would be the duty of the court, the judge need not await the verdict before acting, but in advance may rule the question as one of law. But as verdicts cannot be found on mere conjecture, neither will a shadow or possibility, nor a mere scintilla stand in the way of ruling the case in favor of the party who shows a substantial right, of which there is no substantial contradiction.” (See also *Luhrs v. Brooklyn Heights R. R. Co.*, 13 App. Div. 126.)

The rule thus stated has, however, been narrowed by the later decision of *McDonald v. Met. St. Ry. Co.*, 167 N. Y. 66, in which it is held that the court cannot in any case where the right of trial by jury exists, and the evidence

presents an actual issue of fact, direct a verdict. If in such case the court is dissatisfied with the verdict because against the weight or preponderance of evidence, it may be set aside and order a new trial, but may not under such circumstances direct a verdict.

154. Whether a fact is established by evidence, and what evidence is required to conclusively establish a fact so that a jury may not find against it, are questions not free from difficulty.

The main principle is thus stated in *Kavanagh v. Wilson*, 70 N. Y., at page 179: "It is undoubtedly a general rule that when a disinterested witness, who is in no way discredited, testifies to a fact within his own knowledge, which is not of itself improbable, the witness is to be believed, and the fact is to be taken as legally established so that it cannot be disregarded by court or jury."

So, where the uncontradicted testimony is given by a person who is interested either as a party or related to him, or connected in business with him, the case should be sent to the jury and left to them to pass upon. (See *Honegger v. Wettstein*, 94 N. Y. 252; *N. Y. & Brooklyn Ferry Co. v. Moore*, 18 Abb. N. C. 106; note in 1 Abb. N. C., p. 362, on the "Weight of Testimony of Parties.")

155. Motion to dismiss should be renewed at close of testimony in order to make an exception available. (*Hopkins v. Clark*, 158 N. Y. 299.)

156. Summing-up addresses.— If the case be sent to the jury to determine, counsel for each party has the right to make an address to the jury, the party holding the affirmative of the issue having the last say. As to the limitations of these addresses, the law is very liberal. Everything in the way of argument, appeal, comparison, etc., is allowed. The line of limitation beyond which counsel should not trespass is found in a consideration of the functions of a jury. The jury, under their oaths, decide upon disputed questions of fact, from the evidence before them. They have nothing to do with determining questions of law, nor with facts which

are undisputed, nor with facts not in evidence. It is for the judge to decide all points of law, and to apply the law to undisputed facts. The summing up is addressed to the jury. It should therefore be confined to facts in evidence and comment upon them, and should avoid going outside the evidence and the discussion of law points. (*Williams v. Brooklyn Elevated R. R. Co.*, 126 N. Y., at p. 102; *Halpern v. Nassau Elec. R. R. Co.*, 16 App. Div. 90; *Lesser v. Perkins*, 39 Hun, 341.)

157. The judge's charge.— After the completion of the summing-up addresses the judge delivers his charge to the jury. Here again the difference of the functions of judge and jury is to be remembered, and it is the duty of a judge in giving his charge not to trespass upon the function of the jury, which is to pass upon disputed questions of fact. While the order of the consideration of facts in the charge, and their grouping and coloring are matters entirely within the discretion of the judge, he must stop short of indicating his idea of what the decision upon a disputed fact should be. That is for the jury to determine for themselves. (*Hoffman v. N. Y. C. & H. R. R. Co.*, 87 N. Y., at p. 32; *Allis v. Leonard*, 58 N. Y. 288.) But the mere expression of opinion by the judge upon any matter of evidence will not prejudice the trial if he make it plain to the jury, that the jurors and not himself must decide the facts. (*Sindram v. People*, 88 N. Y. 196.)

158. Exceptions to charge.— If the attorney for either party deems any part of the charge erroneous and prejudicial to his client's interests, he may except to it. The practice is to pick out each objectionable part of the charge and separately except. Care should be taken to make the exception clear and explicit, and not too broad, as if the whole or any considerable part of the charge be excepted to, the exception will not avail if any part of the charge, included within the exception, be correct. (*Wilkinson v. Gill*, 74 N. Y. 63.) The principle is that the alleged error should be brought

clearly to the judge's attention, so as to give him the opportunity to correct it.

159. Requests to charge.— It is the legal right of counsel on the trial of an action to submit propositions of law bearing upon the matters in dispute, and it is the duty of the court to instruct the jury on each proposition. A denial of such right is matter for exception and review. (*Chapman v. McCormick*, 86 N. Y. 479.) The usual practice is for each counsel to have prepared and ready at the time the judge is about to deliver his charge, a numbered list of requests, and hand the list to the judge. At the close of the charge, if either counsel claims that any of his requests have been passed over, he calls the attention of the judge to the omission, and if the judge refuses his request, excepts to the refusal.

If the judge has, however, already charged substantially as requested, it is no good ground for exception if he decline to repeat the proposition.

Nor should a request to charge propositions of law, which, although correct in themselves, are not applicable to the evidence, be granted. With respect to the time for making requests to charge, while the usual practice is as above stated, still the requests may be submitted after the charge has been made, and a refusal then to entertain them is error. (*Chapman v. McCormick*, 86 N. Y. 479; *Gallagher v. McMullin*, 7 App. Div. 321.)

The exceptions either as to matters charged or matters refused must be made before the rendition of the verdict by the jury. (§ 995, Code Civ. Proc.) Otherwise they are not available.

160. The verdict.— After the charge has been made and exceptions and requests disposed of, the jury retire to consult upon their verdict. They are not permitted to take with them any papers concerning the suit, except, with the permission of the court, such as have been marked in evidence as exhibits in the case. They cannot take with them minutes of testimony taken by counsel or by the judge. If the recol-

lection of the jurors does not agree upon any point of testimony or matter in the charge by the judge they should come into court, and, under the direction of the judge, have any part of the testimony read to them, or further instructions given them, or the instructions already given, repeated. (*Ingersoll v. Town of Lansing*, 51 Hun, 101.)

So, if a jury, after retiring, desires further instruction, and request it of the judge, it must be given them provided the counsel for either party second the request. In another form the rule may be stated, that it is the duty of the judge to grant the request, and ground of error if he refuse, but that neither party can take advantage of the error unless he repeat the request and except to the refusal.

Any communication with the jury must be held in open court and publicly. It will vitiate the verdict if the judge communicate with the jury privately. (*Watertown Bank v. Mix*, 51 N. Y. 558.) Of course, any intermeddling with the jurors or any of them by either of the parties, or their attorneys, or counsel, will also vitiate the verdict. (*Reynolds v. Champlain Transportation Co.*, 9 How. Pr. 7; *Nesmith v. Clinton Fire Ins. Co.*, 8 Abb. 141.)

While it is proper for the judge to state to the jury the strong desirability of their agreement upon a verdict, it is not permitted, under our system, to *coerce* a verdict, or to threaten with coercion, and a verdict rendered after such an attempt will be set aside. (*Ingersoll v. Town of Lansing*, 51 Hun, 101; *People v. Sheldon*, 156 N. Y. 268.)

It is within the discretion of the judge as to how long a jury shall be kept together in order to agree upon a verdict, and as to whether they shall be sent back after they have announced that they are unable to agree.

It is quite a common practice when, as frequently happens, the case is given to the jury late in the afternoon, for the judge to direct a *sealed verdict*. When this is done, the judge goes home, and, if the jury agree upon a verdict, they state it in writing, all of the jurors sign it, and it is then inclosed in an envelope and delivered to the clerk. On the

following day, at the opening of the court, the jury assembles, and the clerk opens the envelope and reads the verdict, which is then recorded.

A verdict is usually general in its form, that is, the announcement is "We find for the plaintiff for (so many) dollars," or "We find for the defendant," although a special verdict may be given by or required of the jury. (§§ 1186, 1187, Code Civ. Proc.)

When a verdict is announced, it is the right of either party to have the jury "polled," that is, to have the clerk call the roll and ask of each juror as his name is called — "Is that your verdict?" If they all answer in the affirmative, the verdict is recorded. If any one of them dissent, the verdict is not recorded, and the jury is sent out. It is error to direct the verdict to be entered if any juror dissent upon the polling. (*Weeks v. Hart*, 24 Hun, 181.)

If the jury becomes incomplete at any time during the trial by reason of the death, sickness, disability, or absence of any of its members, the trial ends, unless both parties stipulate to proceed with the incomplete number.

161. Motions after verdict.—The attorney for the unsuccessful party should remember to lay the foundation for an appeal, by moving for a new trial on the judge's minutes, and asking for a stay of execution.

The practice with reference to motions for a new trial will be considered under the head of "Proceedings in Review."

162. Trial by the court is had where the case is not in its nature triable by jury under the principles discussed in paragraphs 130–132, or where, although triable by jury, that method has been waived.

In any common-law action arising on contract, the parties may, if they choose, waive the jury and the judge must then try the case without a jury. In all other common-law actions the parties may likewise waive the jury, but the judge may, if he chooses, annul the waiver and insist upon a jury trial. (Code Civ. Proc., § 1008.)

163. Methods of waiver of jury trial, so far as the statute is concerned, are enumerated in Code Civ. Proc., § 1009, but the consideration of these becomes unimportant in view of the principle adopted by the decisions that any conduct amounting to acquiescence in the disposition of the case without a jury will amount to a waiver. (*Mackellar v. Rogers*, 109 N. Y. 468; *Baird v. The Mayor*, 74 N. Y. 382.)

164. Trials of issues of law.—These, as we have seen, arise only upon a demurrer, and must be tried by the court without a jury. Such a trial is simply the examination of the pleading demurred to with reference to the defects claimed to be apparent upon its face. There is no fact in question, for the same reason as at common law, *i. e.*, that the statements of the pleading demurred to not being denied are constructively admitted. There is consequently no use for a jury, for there is nothing for them to try, and no occasion for testimony, for there is nothing denied.

The case is put on the calendar by filing a note of issue, and when it is called in its order, the question of law is argued. The demurring party furnishes the court with a copy of the pleadings (sometimes called the Demurrer Book), and opens and closes the argument. It is quite usual for each counsel to submit a brief containing the points of his argument with authorities.

165. Trials of issues of fact by the court.—Such trials are had, as we have seen, either in equity actions, or in actions at law where the jury has been waived. The procedure upon such a trial is similar to that in a jury trial. There is, of course, an omission of everything relating to the drawing of a jury, but the case is opened and summed up, and witnesses examined in the same manner. There can be no motion to direct a verdict, no requests to charge, no charge and no exceptions thereto, but motions for judgment may be made at the same stages as in jury trials.

In trials by the court without a jury there is more laxity in the admission of evidence objected to by reason of its

irrelevancy. The reason for this difference is that where irrelevant evidence is admitted before a jury it cannot be said that it did not have a controlling effect, while in the case of such admission on a trial before a judge alone, if there is any competent and relevant evidence upon which he could base a finding it will be presumed that he ignored the irrelevant evidence. (*Wright v. Dugan*, 15 Abb. N. C. at p. 121.)

166. Referees and references.—Under the earlier practice the reference of a case *to hear and determine* was unknown. Both at common law and in equity the services of certain officials were employed to *assist* the court, but never to take the place of the court. Thus, in equity practice, masters in chancery, under order of the court, take and report testimony, and, in an action at law, commissioners may serve a similar purpose, but the device of selecting an unofficial person and clothing him with complete judicial power, for the purpose of the case referred to him, is entirely modern and statutory.

The Code of Civil Procedure makes provision for two very different kinds of references, namely, the reference to hear and determine, in which the referee is for the purposes of the action made a judge, to try the case; and the incidental reference, in which the referee is appointed, not to try the case, but for some special purpose, such as the taking of testimony or the like, where he acts in a merely subordinate capacity.

167. References to hear and determine, by consent.—Under the Code plan, the parties to any action, whatever its nature (save in the few cases presently mentioned), instead of having the trial in the usual method, may have such person as they may agree upon appointed, by order of the court, referee to try the case. Upon a stipulation being made by the parties, the court has no option but to make the order of reference. (Code Civ. Proc., § 1011.)

In the three classes of actions mentioned in section 1012, the court is given power to refuse a reference, even though the parties consent. These excepted cases are:

1. The matrimonial actions.

To annul a marriage.

For a divorce.

For a separation.

2. Actions to wind up a corporation.

3. Where there is an infant defendant. It will be noticed that in each of these excepted cases there is a public interest, and a special reason based upon such interest, why the parties themselves should not be allowed, as they are in ordinary cases, to absolutely control the method of trial. While the law does not provide that such actions shall in no event be referred, it does provide that the court shall say whether or not the consent of the parties shall be effective, and that when such an action is referred, it shall be to a person not named by the parties, but selected by the court.

168. References to hear and determine, by compulsion.—

Generally, whether an action shall be referred or not, depends upon the parties themselves. In a single class of actions, a reference may be ordered regardless of consent, namely, where the trial will require the examination of a long account. If the action be at law, and thus upon general principles triable by a jury, it will not be referred without consent, unless it be an action *on contract* in which a long account is involved. As such actions were referable prior to the Constitution of 1846, the right of trial by jury was not preserved as to them. Whether an action is referable or not depends upon the cause of action set forth in the complaint. This must show that there has been a long account between the parties which is the subject of the action. The mere fact that there are a great number of different items of damage alleged will not make the cause referable. (*Welsh v. Darragh*, 52 N. Y. 590; *Camp v. Ingersoll*, 86 N. Y. 433; *Untermeyer v. Beinhauer*, 105 N. Y. 521; *Steck v. Colorado Fuel & Iron Co.*, 142 N. Y. 236.)

Equity suits, also, if involving long accounts, may be referred for trial. (*O'Reilly v. City of Kingston*, 30 Hun, 508.)

169. The motion for a reference.—Such a motion can of course be made only in a case in which it is claimed by the moving party that a compulsory reference may be ordered. It should be made upon the pleadings and an affidavit setting forth the facts.

In opposition, it may be contended that “a long account” within the meaning of the statute is not involved, or that there is a difficult question of law in the case, or that the moving party has unduly delayed his motion. For instance, where the motion to refer was delayed until the cause was on the day calendar, it was denied. (*Mayor v. Genet*, 4 Hun, 658.)

170. Referees.—A lawyer is usually selected as referee, although there is nothing in the statute making such a selection necessary; and, while the statute permits a reference to three or five referees, the almost invariable custom is to name but one. (Code Civ. Proc., §§ 1024–1026.)

When a referee is appointed otherwise than by consent, the Rules of Practice require an attorney in good standing to be selected, and one entirely free from business connection with the attorney making the application. (Rule 79.)

The referee is an officer of the court, and at all times subject to its control for any misconduct, for which he may be removed. The referee should take the statutory oath before entering on his duties. (Code Civ. Proc., § 1016.)

171. Incidental references.—These are provided for in section 1015, Code Civ. Proc., and include all references excepting those to hear and determine already considered.

The cases in which these references are most frequently used are to take an account after an interlocutory judgment; to take proof of facts in partition and foreclosure; to take depositions of parties or witnesses before trial, or in supplementary proceedings, or for use in motions.

It was at one time the usual practice to take testimony in undefended divorce actions under this section, but the scandals which arose under this procedure led to a local rule that all such testimony should be taken in court.

172. Powers of referees.—Upon referees to hear and determine, the statute devolves the same powers as are exercised by a trial judge in court. Such powers, including that with reference to summary amendments, are enumerated in section 1018, Code Civ. Proc.

Apart from the authority of the court to remove a referee for personal misconduct, the action of a referee upon a reference to hear and determine can be reviewed only in the same methods as are provided to review judicial errors — namely, by exception and appeal.

A referee appointed for a special purpose — other than to hear and determine — has no such general powers. His powers are limited strictly by the order which appoints him and the purpose for which he is appointed. If he is appointed to take testimony for some particular purpose, he is obliged to take whatever is offered, unless the court expressly directs him otherwise, or unless he is required to report with his opinion, in which case he may pass upon the relevancy of testimony. (*Ayres v. Village of Hammondsport*, 11 St. Rep. 706; *Fox v. Moyer*, 54 N. Y. 125.)

173. Proceedings before referees.—A hearing before a referee to hear and determine is brought on in the same manner as a trial before the court, namely, by a notice of trial. (Code Civ. Proc., § 1018.)

In incidental references (under section 1015) there is no method provided in the Code for bringing on a hearing. Consequently the proceeding, under Rule 83 of the General Rules of Practice, is brought on by the use of the summons to attend before referee, a relic of old ante-code practice.

A useful note upon the subject of trials before referees will be found in 22 Abb. N. C. 8.

174. Referee's report.—This paper, which corresponds to the decision in writing which is used on a trial before the court without a jury, must either be filed or handed to one of the attorneys within sixty days after the submission of the cause. If he fails to do so, either party may give notice terminating the reference, but if no such notice be given the

report may be delivered notwithstanding the expiration of the designated time.

In references to hear and determine, the testimony is not annexed to the report, while in incidental references (excepting in references to compute the amount due in foreclosure), the testimony is required to be signed by each witness and filed with the report. (Rule 30, General Rules of Practice.)

In references to hear and determine, judgment is entered directly on the report without further proceeding. In incidental references, the report is filed and becomes absolute and confirmed as a matter of course, unless exceptions thereto are filed and sustained. (Rule 30, *supra*.)

CHAPTER V.

THE JUDGMENT.

Judgment in an action may be entered, either for default in pleading, or after the trial of issues.

175. Judgments by default.—Where a defendant is subjected to the jurisdiction of the court by the service of a summons, and he interposes no defense to the claim set forth in the plaintiff's complaint, judgment may be taken against him because of his failure to defend. Depending upon the character of the plaintiff's demand, the proceedings to obtain judgment by default are sometimes conducted before the clerk of the court and sometimes before the court.

If the defendant default in an action on contract, express or implied, where the sum recoverable appears from the contract itself, or is capable of being ascertained therefrom by computation, judgment may be taken without application to the court. In every other action, application to the court and proof of damages are necessary. (Code Civ. Proc., § 420.)

176. Proceedings before clerk on entering judgment on default.—Assuming the action to be of the character in which no application to the court is necessary, the proceedings may take place before the clerk, provided the complaint has been served, or the notice specified in section 419, Code Civ. Proc., has been served with the summons.

If neither complaint nor notice has been served, application for judgment must be made to the court.

No notice of the proceeding before the clerk need be given to the defendant unless he has appeared in the action. If he has made a formal appearance, it entitles him to notice of all subsequent proceedings.

If the complaint be verified, the proceedings consist simply

in the filing of these papers and the formal entry by the clerk of the judgment demanded:

1. The summons and complaint.
2. Affidavit of service.
3. Affidavit showing default.

If the complaint be unverified, proofs are taken under oath before the clerk to ascertain the amount due. As complaints are generally verified, the taking of proofs before the clerk is quite unusual. (Code Civ. Proc., §§ 1212, 1213.)

177. Judgments by default on application to court.—

Save in the limited class of cases in which the proceedings upon a default may be had before the clerk, applications for judgment must be made to the court. No notice of this application is required to be given the defendant unless he has appeared generally, or has specially demanded notice under the provisions of section 1219, Code Civ. Proc. Upon such applications the summons and complaint with proofs by affidavit of service and default are presented, and the court then takes the proofs necessary to establish the amount of damages, which is the only question upon such an application, upon which evidence is taken. Evidence upon this point may be taken in court, either with or without a jury, or before a referee appointed for that purpose, or by means of a writ of inquiry. If the action be to recover damages for a personal injury, or an injury to property, the damages must be ascertained by means of the last-named method.

178. Writ of inquiry.—This instrumentality is mentioned several times in the Code, but is nowhere therein defined or explained. It is a survival from common-law practice. A writ of inquiry is a judicial writ, directed to the sheriff of the county in which the action is triable, stating the former proceedings in the cause, and "because it is unknown what damages the plaintiff has sustained" commanding the sheriff to inquire into the same by his jury, and return the inquisition into court. When, therefore, the Code provides that in actions to recover damages for personal injuries or for injuries to property, in cases of defendant's default, the dam-

ages must be ascertained by means of a writ of inquiry, it is simply a requirement that in such cases the damages shall be ascertained by a sheriff's jury. This is constituted from a specially selected list of two hundred and fifty to three hundred jurors who serve for a year. (Code Civ. Proc., § 1112.)

Upon the hearing, in such a case, before the sheriff's jury, the sheriff or his under sheriff presides, and witnesses are examined, as upon a trial, on the one question as to damages. Upon this question the defendant's counsel may cross-examine plaintiff's witnesses and produce testimony of his own.

The finding of the sheriff's jury is put in writing and duly certified, and becomes the basis for entry of judgment either directly, or after further application to the court, depending upon the court's direction in that particular. (Code Civ. Proc., § 1215.)

179. Judgment following default after service of summons otherwise than personally.—Where the summons has been served either by the substituted method of service or by publication, and the defendant defaults, judgment can be taken only upon application to the court. Upon such an application, full proofs are required to show three things:

1. That the service is complete. In case of substituted service, the service is complete when the affidavit required by section 2437, Code Civ. Proc., is filed. If the service is by actual publication it is complete on the last day of publication, that is, after six full weeks from the first publication; and if the service is by delivery out of the State, service is complete forty-two days after such delivery. (Code Civ. Proc., § 441.)

2. That the defendant is in default.

3. Upon this application full proof of the cause of action is required either before the court or a referee. In other words, nothing is taken to be admitted by the defendant's default except in case of personal service. Even more than proof of the cause of action is required where the defendant is either a nonresident or a foreign corporation. In all such

cases the court must cause the plaintiff, his agent, or attorney, to be examined under oath respecting any payments to him or for his account, on his demand. (Code Civ. Proc., § 1216.)

The following section (1217) is susceptible of two possible constructions. It may mean that a money judgment against a defendant following his default after service otherwise than personal, can be rendered only in one of the kinds of cases enumerated in section 635 (*i. e.*, in actions to recover damages for breach of contract, for conversion, or for injury to person or property). If this be the true construction a money judgment in such an action could be entered against a resident defendant served by substituted service; or it may mean, that unless the service has been personal, a money judgment may not be rendered unless an attachment has been made and executed. This construction would lead to the result that a substituted service would be worthless to obtain a money judgment, without the granting and execution of a warrant of attachment. However this may be, it is at least certain that judgment by default for money against a nonresident or foreign corporation, following default after service by publication, can only be taken after proof of a levy under a warrant of attachment, with a description and valuation of the attached property.

180. Judgment by default against an infant defendant cannot be entered until twenty days after the appointment of a guardian *ad litem* for him. (Code Civ. Proc., § 1218.)

181. Judgment after verdict in a trial by jury.—The clerk of the Trial Term where the trial has taken place makes in his minutes the entry provided in section 1189, Code Civ. Proc. A copy of this entry is furnished the attorney for the successful party, and judgment is then entered in the clerk's office according to the terms of the verdict without further application to the court.

182. Judgment after trial by the court without a jury.—After trial by the court the law requires a formal decision in writing to be signed by the judge. This decision contains,

either elaborately or concisely, the facts found and conclusions of law thereupon, and judgment is thereupon entered by the clerk according to its directions. (Code Civ. Proc., §§ 1010-1022.)

Such a judgment may be either final or interlocutory. A final judgment is one which finally and completely determines the rights of the parties in the action.

An interlocutory judgment is an intermediate or incomplete judgment, where the rights of the parties are settled, but something remains to be done, as where there is an accounting to be had, a question of damages to be ascertained, or permission given for an amended pleading instead of one held defective on demurrer.

In the case of the trial of an issue of law, upon a demurrer to a pleading, the decision usually provides for an interlocutory judgment which determines the sufficiency of the pleading demurred to, permits an amendment by the party in fault, and provides for final judgment if the amendment be not made. (Code Civ. Proc., § 1021; *Liegeois v. McCrackan*, 22 Hun, 69.)

183. Judgment may be for or against any of the parties. — Code Civ. Proc., § 1204. This section permits a recovery in favor of such plaintiffs as establish a cause of action against such defendants as are proved liable. For example, where a plaintiff sues some only of parties jointly liable on contract and the nonjoinder is not properly pleaded either by demurrer or answer, judgment may be rendered against those sued, although it transpire upon the trial that others are jointly liable with them. (*Fowler v. Kennedy*, 2 Abb. Pr. 347.)

And so, on the other hand, where a plaintiff sues too many, he may recover against those proven liable and fail only as to those who successfully defend. (*Zink v. Attenburg*, 18 How. Pr. 108; *Barker v. Cocks*, 50 N. Y. 689.)

The judgment "may determine the ultimate rights of the parties *on the same side* as between themselves, and it may

grant to a defendant any affirmative relief, to which he is entitled." (Code, § 1204.)

This expression was formerly held to mean only such relief as a defendant might be entitled to against the plaintiff, and that a defendant could not obtain under its provisions relief against his codefendant; but the later authorities hold that in proper cases relief may be granted in favor of one defendant against another. (*Derham v. Lee*, 87 N. Y. 599; *Lansing v. Hadsall*, 26 Hun, 619; *Chapman v. Forbes*, 123 N. Y. 532.)

Where an action is brought against a number of defendants upon an alleged *joint* liability, judgment may be entered against any of them as to whom liability is established. (Code, § 1202; *Stedeker v. Bernard*, 102 N. Y. 327.)

184. Judgment not limited by demand in complaint.— Code, § 1207. The effect of this section is to make the demand for relief immaterial, provided the defendant has answered, while if he has not answered the plaintiff may not recover a more favorable judgment than that demanded. The courts now uniformly administer the relief to which the facts set forth in a pleading, when supported by evidence, seem to entitle the party, without regard to the relief demanded. (*Murtha v. Curley*, 90 N. Y. 372; *Chatfield v. Simonson*, 92 N. Y. 209.)

185. Effect of judgment dismissing complaint.— Whenever a defendant succeeds in defeating the plaintiff's claim, the result is a judgment dismissing the complaint. If such a judgment is reached after a litigation upon the merits of the action, it is *res adjudicata* between the parties, and settles all issues raised by the pleadings conclusively, subject only, of course, to proceedings directly to review the judgment. If such a judgment is reached merely because of some defect in plaintiff's proceedings, and not upon the merits, it does not prevent a new action for the same cause of action. For instance, if, upon a trial, at the close of the plaintiff's evidence, the defendant move to dismiss the complaint because of some defect in the plaintiff's pleadings or proofs, and

such motion be granted, all that is decided is that upon the facts presented the plaintiff cannot recover, and while the judgment in form dismisses the complaint, in such case it will not prevent a new action. While, if upon a trial both sides submit the case upon the testimony, and there then be a determination for the defendant, the complaint will be dismissed *upon the merits of the action*, and the judgment will prevent a new action for the same cause. (Code, § 1209; *Bliven v. Robinson*, 152 N. Y. 333.)

The provisions of this section render the form of the judgment important. If it merely provide that the complaint be dismissed, it will not prevent the institution of another action for the same cause, while if the phrase be added "upon the merits of the action," it is a bar to any future action for the same cause.

If the defendant enter his judgment in the latter form when the truth is that a mere nonsuit was directed, the plaintiff should move its amendment.

186. Judgment on referee's reports in a reference to hear and determine is entered directly on the report, just as though it were a judge's decision, and without the necessity of any application to the court; except in matrimonial actions. In the class of actions last named, following the policy that the courts shall exercise a close control over all proceedings therein, it is provided (Code, § 1229) that judgment can only be taken upon application to the court.

It has been contended that this provision permits and requires the court to review the evidence taken upon a reference to hear and determine a matrimonial action, and to reach a conclusion independently of a referee's judgment, but the courts have preferred the view that the purpose of the legislature in framing this section was simply to require the *fiat* of the court as a safeguard against irregularity, collusion, and fraud, and that it did not intend to provide an additional review of the decision of the referee upon questions of fact, or to require that the actual trial of the issue should be had partly by the referee and partly by the court,

or that the determination of the issue should be withdrawn from the referee. (*Schroeter v. Schroeter*, 23 Hun, 230; *Ryerson v. Ryerson*, 55 Hun, 191.)

187. The judgment-roll constitutes the record of the action. From it appears — by the process, what parties were before the court; by the pleadings, what issues were litigated between them; and by the judgment, what determination was made. Incidental papers and papers used in provisional remedies are not properly made a part of the judgment-roll. The purpose of the roll is to furnish an official record of what was decided in the main controversy between the parties. Where the judgment *is based* upon an attachment proceeding, instead of upon a personal service or an appearance, the attachment is then something more than a mere provisional remedy. It is, in such case, the foundation of jurisdiction and its papers should then form a part of the judgment-roll.

The roll must contain whatever is necessary to show that the defendant was properly brought before the court. In case of his default this is shown by the affidavit of service, or by the proofs of publication, but where the defendant has appeared and defended, his pleading sufficiently shows his subjection to jurisdiction without other proofs. The pleadings in the roll should be those upon which the cause was decided. If any have been superseded by amended pleadings, the latter alone should be placed in the roll. The judgment-roll should be prepared for filing by the attorney for the successful party, and no proceedings can be had to enforce the judgment until the roll is made up and filed. (Code, §§ 1237-1239 and 1217.)

188. General methods of enforcing judgments.— Under the old practice, a judgment in a common-law action was enforced through an execution, while that in an equity suit was enforced by process of contempt. The same general methods are continued in like cases under the Code, and to that end section 1240 of the Code applies to actions at law and the following section to suits in equity. Under Code practice, however, the general principle is that a judgment

for a sum of money only, whether at law or in equity, can be enforced only by an execution. (*Jacquin v. Jacquin*, 36 Hun, 378.)

189. Docketing judgments.—The judgment, considered only as a judicial determination of the rights and obligations of the parties, is complete upon the filing of the judgment roll. The provisions for docketing judgments (§ 1245 *et seq.*, Code) are for the purpose of making them liens upon the real estate of the judgment debtor. The entry of the particulars of the judgment upon the index called the docket affixes a lien to the amount of the judgment upon all real estate within the county which the debtor then has, or which he may within ten years thereafter acquire.

190. Transcripts of the judgment docket may be obtained from the county clerk with whom the roll is filed, and these transcripts may be filed and the judgments docketed in as many counties of the State as desired. A transcript is thus filed whenever it is desired to affect land in other counties than that in which the original docket is made, with the lien of the judgment, and also as the necessary basis for issuing an execution in such county.

191. Satisfaction of judgments.—If the judgment be paid it is desirable to have the docket marked satisfied so as to end the lien. This is done by the filing of a certificate of satisfaction made by the judgment creditor, or, if within two years after the recovery of the judgment, by his attorney. (Code, § 1260 *et seq.*)

CHAPTER VI.

PARTIES TO ACTIONS.

192. Parties plaintiff.— The first matter which a plaintiff's attorney about to commence a suit must take into consideration, is as to who shall sue, and who shall be sued; he must make up his mind who the parties, plaintiff and defendant, shall be, before the summons is drawn. Ordinarily no difficulty arises. The person or persons owning the claim or right in action, as plaintiff or plaintiffs, brings suit against the person or persons liable thereunder, as defendant or defendants. Where two or more persons are jointly entitled, or have a joint legal interest, they must join as plaintiffs. Parties holding separate and distinct claims may not join as plaintiffs in one action. Where one of several parties jointly interested in a right of action refuses to bring suit, the others may join as plaintiffs, and name him as one of the defendants, explaining the reason in the complaint. (Code, § 448.)

193. Parties defendant in actions ex contractu.— The general principle here is that *all jointly liable* shall be named as parties defendant. If the burden of a contractual obligation be upon more than one person, all who share in the burden should be named in an action based upon it. If less than all are made parties, however, and the defendant fail to raise the question either by demurrer or answer, the plaintiff will not, under Code practice, be prevented from recovering because of the defect.

194. Parties defendant in actions ex delicto.— If the action be to recover damages for a tort committed by several persons, the plaintiff may at his option sue any, either, or all of the wrongdoers. If he choose to sue one or any less than the whole number, those sued cannot object that the others are not joined. (*Weidman v. Sibley*, 16 App. Div. 616.)

195. **Parties in equity actions.**—In such actions in which collateral and incidental rights are sometimes affected, it is quite usual to bring in every individual whose rights may be involved, and in such cases a distinction is sometimes made between *necessary* parties defendant, or those without whom no decree at all can be rendered, and *proper* parties defendant, or those whose presence renders the decree more effectual. All the proper parties are those by whose presence the decree becomes a complete determination of all the questions that can be raised, and of all the rights which are connected with the subject-matter of the controversy. (Pomeroy's Remedies and Remedial Rights, §§ 329, 330.)

196. **"Every action must be prosecuted in the name of the real party in interest."**—Code, § 449. That is, the person who *owns* a right sues upon it. Such a person may, for instance, be the party with whom a contract was made; his assignee, if he has transferred the right; his personal representatives, if he be dead; or the party for whose benefit a valid contract is made under the doctrine of *Lawrence v. Fox*, 20 N. Y. 268. In case of assignment the simple question is—"Has the right of action been transferred to the plaintiff?" If so, the assignee is the real party in interest no matter whether he paid a consideration for the assignment or not. (*Sheridan v. Mayor*, 68 N. Y., at p. 32.) The same principle is applied in actions on negotiable instruments. (*Hays v. Hathorn*, 74 N. Y. 486; *Bell v. Tilden*, 16 Hun, 346.)

197. **Actions upon assigned claims; at common law and under the Code.**—At common law, a party having a right to sue another, was not permitted to transfer that right to some one else. This was a part of the general policy to discourage litigation and to prevent a traffic in rights, or choses in action.

With the progress of civilization, however, the idea of property in rights developed, and was recognized in courts of equity, which held an assignment of a chose in action to be valid, so as to pass the beneficial interest to the assignee.

This equitable doctrine became so far recognized in courts of law as to permit actions upon assigned claims, but out of respect to the old legal doctrine, such actions were brought in the name of the assignor, or original party in interest.

The Code in section 449 abrogates the old form by declaring that the action shall be brought in the name of the *real* party in interest, who after an assignment is, of course, the assignee.

General principles of assignment of rights.

In order to pass a beneficial interest to the assignee, the right assigned must be in existence; and any existing right may be assigned; but both branches of this general rule are subject to important exceptions:

a. An assignment of wages to be earned under an existing employment made in good faith, and for a valuable consideration, is valid; but public policy does not permit an assignment of salary not yet due, by a public official.

b. Courts of equity will uphold assignments, not only of choses in action, but of contingent interests and expectancies, and things having no present actual existence, if fairly made and not against public policy; not as a transfer operative *in presenti*, for that can only be of a thing *in esse*, but as a present contract to take effect and attach as soon as the thing comes into being. Such assignments are enforced on the ground that the assignee is entitled to have immediate specific performance of the contract to assign, as soon as the property comes into existence in the hands of the assignor, who holds it then in trust for the assignee.

An assignment of a right or thing in possession need not be supported by a consideration in order to be effective between the parties — otherwise, with reference to the assignment of an expectancy or a future or contingent interest, which will not be recognized unless the transfer has been for a valuable consideration. (See *Field v. Mayor*, 6 N. Y. 179; *Bliss v. Lawrence*, 58 N. Y. 442.)

c. The rule that *any* existing right may be transferred by

assignment is subject to the qualification that such purely personal rights as die with the person may not be assigned. The general principle, with the exception, is expressed in *Meech v. Stoner*, 19 N. Y., at p. 29, as follows:

"The assignability of things in action is now the rule; nonassignability the exception. And this exception is confined to wrongs done to the *person*, the *reputation*, or the *feelings* of the injured party, and to contracts of a purely personal nature, like promises of marriage." (See also *Haight v. Hayt*, 19 N. Y. 464; *Wade v. Kalbfleisch*, 15 Abb. Pr. N. S. 17; *Cox v. N. Y. C. & H. R. R. Co.*, 11 Hun, 621.)

Method of assignment. In order to constitute a valid assignment of a debt or other chose in action no written instrument or particular form of words is necessary. Any order, writing, or act which makes an appropriation of a claim or fund operates as an assignment. A writing, however, may be useful, as preserving the evidence of an assignment.

Notice. To complete the assignment of a demand or chose in action as against the debtor, he must be informed of the transfer. Until so informed he is entitled to regard the assignor as the owner, and may pay to and accept a release from him or purchase a debt which he owes and use it as a set-off. But when notified of the transfer, the debtor can thenceforth do no act to the prejudice of the rights of the assignee. (*Bishop v. Garcia*, 14 Abb. Pr. N. S. 69.)

Effect. The assignee of a chose in action, except in the case of negotiable paper, takes it subject to every defense that would be valid between the original parties, up to the time the debtor receives notice of the assignment. By the assignment of a demand the assignee becomes entitled to every remedy, lien, or security that could have been used or made available by the assignor as a means of indemnity or payment. A further effect of the assignment, prior to the Code, was to give to the assignee the right to use the assignor's name in an action to recover upon the demand. This right, as we have seen, has no further utility.

198. Exceptions to the rule that action must be prosecuted in name of real party in interest.

1. *Executors and administrators.* The real parties in interest where a suit is brought by an executor are the beneficiaries under the will, or, if by an administrator, the creditors and next of kin of the decedent. These cases were therefore, necessarily, made an exception to the general rule.

2. *Trustees of an express trust.* This expression would ordinarily be understood to designate a trustee under one of the trusts expressly permitted by the Revised Statutes, but for the purposes of this section it is given a much wider signification, namely, "A person with whom or in whose name a contract is made for the benefit of another." (*Considerant v. Brisbane*, 22 N. Y. 389.)

This provision is permissive and not mandatory. It does not forbid an action by the beneficiaries with or without the trustee. (*Hubbell v. Medbury*, 53 N. Y. 98.)

199. **Married women.**—Section 450, Code, completely abrogates the common-law rules concerning married women as litigants. Its effect is to make a husband, as such, an unnecessary and improper party in all actions wherein his wife is joined, unless he has some personal interest or obligation. (*Bennett v. Bennett*, 116 N. Y. 584.)

The remnant of the common-law rules which remained when this case was decided was swept away by an amendment in 1890.

200. **Unknown defendants** may be designated by names fictitious either in whole or in part. (Code, § 451.) When the true name is discovered, an order amending all the proceedings accordingly is made as a matter of course.

This provision does not permit the use of a fictitious name, applicable to no specific individual but adopted as an expedient to cover the name of a person not sued, nor intended to be sued, and whom the plaintiff only purposes to make a defendant if he discovers at some later period that he ought to do so. (*Town of Hancock v. First National Bank*, 93 N. Y. 82; *Anderson v. Horn*, 23 Abb. N. C. 475.)

201. Bringing in new parties where their presence is necessary to make a complete determination.—We have already considered the general rule that where there is a defect of parties it may be taken advantage of, by either demurrer or answer, each in its appropriate case.

But in certain equitable actions, section 452 of the Code imposes upon the court, regardless of any act or omission on the part of the defendant, the duty of bringing in or directing to be brought in such absent parties without whose presence a complete determination of the controversy cannot be had.

The test is that if the rights of some person not a party are likely to be injuriously affected by the judgment, it will not be rendered until he is given an opportunity to defend. The court will not conclude his rights until he has had his day in court. (*Osterhoudt v. Supervisors*, 98 N. Y. 239; *Lawton v. Lawton*, 27 St. Rep. 302.)

But in an action at law to recover a money judgment, the plaintiff cannot, under this section, be compelled to bring in other defendants than those he has named. In such case the defendant is left to his remedy to set up the defect in his answer. (*Chapman v. Forbes*, 123 N. Y. 532.)

202. Supplemental summons.—When, after the commencement of an action, it becomes necessary to bring in additional parties defendant, it is, in all cases, necessary, upon motion for that purpose, to procure an order. If this order be made upon application of a party seeking to be brought in, nothing else than the order is needed; but in any other case, a supplemental summons, in similar form to the original, but addressed to the new parties alone, is required to be issued and served, and thenceforth after the usual opportunity to plead has been given the new defendants, the action proceeds as though they had been in from the beginning. There is no such thing as bringing in a defendant summarily. Unless he came into the case of his own volition, he must be brought in by regular process, and the right to plead and

his day in court must be given him. (Code, § 453; *Hood v. Hood*, 85 N. Y. 561.)

203. Parties severally liable.—At common law it was essential in an action against a number of defendants to allege and establish the joint liability of all — otherwise the action failed; and as to parties who were only severally — that is separately and distinctly — liable under any obligation, it was improper to join them in one action. Section 454 of the Code changes this rule in respect to the one class of actions upon *written instruments*, including bills of exchange and promissory notes. In such cases where distinct and separate obligations exist under the same instrument, the party beneficially interested may sue any or all in one action. The rule, which is permissive and not mandatory, is confined to the case of several defendants severally liable upon the same demand, in which the plaintiff can enforce the entire demand against any one.

This change was first made by statute in 1832, but was then, and until the Code of 1848, confined to actions upon negotiable instruments (bills of exchange and promissory notes, in which drawers, acceptors, indorsers, etc., may be sued together, although their obligations are distinct and separate. These are still the principal cases in which this provision is used. Under its provisions it is now permitted, for instance, to sue in one action a lessee and a party who joins in the lease as his surety. (*Carman v. Plass*, 23 N. Y. 286.)

Although it is not permitted to join in one action the principal debtor and a surety who becomes such by a distinct instrument, although it be indorsed upon the principal's obligation. (*Barton v. Speis*, 5 Hun, 60.)

Where the use of this provision of the statute would in any way prejudice the rights of any of the defendants it will not be permitted. (Code, § 455.)

When a plaintiff under this provision names in his summons and complaint a number of parties defendant severally

liable upon his demand, he may proceed to judgment against any of them separately. (Code, § 456.)

204. Poor persons.— Ordinary litigants are obliged to pay certain small incidental expenses of litigation, such as clerk's and jurors' fees, and are, in the event of defeat, responsible for such costs as may be awarded against them. If a person desires to sue or defend, without such expense or consequence, and his circumstances are such that outside of his wearing apparel and necessary household furniture, he is not worth one hundred dollars, he may present a petition for leave to sue or defend "as a poor person." The petition is required to be supported by a certificate of counsel that he has examined the case and is of opinion that the applicant has a good cause of action or defense.

The court, if satisfied with the proofs, grants the petition and permits the applicant to sue or defend as a poor person, and assigns an attorney and counsel who is required to act without compensation. (Code, §§ 458-467.)

The commonest use of this proceeding is in cases of infant plaintiffs whose guardians cannot give security for costs. (*Irving v. Garrity*, 13 Abb. N. C. 182.)

But a series of later decisions have placed many obstacles in the way of sustaining such petitions. (*Weinstein v. Frank*, 56 App. Div. 275.)

205. Infant parties.— An adult, not under any disability, may prosecute or defend an action, either personally, or through the employment of an attorney to represent him. An infant can do neither. While a suit may be prosecuted or defended for him notwithstanding his infancy, he cannot himself direct the proceedings nor employ an attorney to represent him. He is represented by a guardian appointed for the purposes of the action, called a "guardian *ad litem*," to distinguish him from other sorts of guardians. *Guardians ad litem* are charged with the responsibility of the conduct of the prosecution or defense of the action in behalf of the infants represented by them. They may, if they deem it necessary, employ attorneys and counsel; are bound to look

after the rights of their wards and have no power to waive or consent to anything. In all matters where an adult party, or his attorney, might exercise his discretion, the guardian *ad litem* should take instructions from the court. The qualifications of a guardian *ad litem* are that he shall be competent to understand and protect his ward's rights, have no interest adverse to those of the infant, nor be connected in business with the adverse attorney, and of sufficient financial responsibility to answer in damages for negligence or misconduct. (Rules 49 and 50, General Rules of Practice.)

Responsibility for costs. The guardian of an infant plaintiff is responsible personally for costs to the adverse party in the event of the latter's success. (Code, § 469, last sentence.) In the absence of misconduct, however, he has his remedy over against his ward's estate.

The guardian of an infant defendant, however, is not liable for costs unless specially charged therewith by order of the court, because of his personal misconduct. (§ 477.) The reason for this difference is that a guardian for an infant plaintiff has control over the commencement of an action in behalf of his ward, while an infant defendant's guardian cannot prevent the commencement of an action against his ward.

206. Guardian for infant plaintiff.—The first step preliminary to the commencement of an action in behalf of an infant, even before the summons is issued, is to procure the appointment of a guardian *ad litem*.

This is done by the preparation and presentation of a petition to the court in which the action is about to be brought. This petition is executed by the infant himself if he be fourteen years old or upwards. If he be under that age the petition must be made either by his general guardian, or a relative or friend. In the latter case notice of the application is required to be given to the general guardian if there be one, or, if not, then to the person with whom the infant resides.

The petition should state briefly the nature of the action

about to be brought, the age of the infant, and should nominate a person for appointment. The affidavit of the person so nominated showing his qualifications should be attached, together with his consent to act, which should be acknowledged.

Upon these papers an order appointing the guardian is made, which may be either a court or a judge's order. (Code, §§ 470, 472.)

The omission to appoint a guardian *ad litem* for an infant plaintiff before the bringing of an action is not a jurisdictional defect, but is an irregularity merely which may be cured by an order *nunc pro tunc*. (*Rima v. Rossie Iron Works*, 120 N. Y. 433.)

207. **Guardian for infant defendant.**— Before a guardian can be appointed for an infant defendant, the summons must be served on the infant. The court is without jurisdiction to appoint a guardian for a defendant prior to such service, and such an appointment is a nullity. (*Ingersoll v. Mangam*, 84 N. Y. 622.)

If the infant be fourteen years old or more, he may execute the petition himself, provided application be made within twenty days after service of the summons upon him. If the infant be under fourteen, or being over that age neglects to apply for himself, then the application may be made by any other party to the action, or by a friend or relative, the practice being similar as in case of the appointment of a guardian for an infant plaintiff, excepting in one case. If an application be made by a *plaintiff* for the appointment of a guardian for a defendant, care must be taken, pursuant to Rule 49, to avoid nominating a guardian in the petition. In this case the affidavit and consent of the guardian is not presented to the court, until after the court has designated him for appointment. (Code, § 471.)

208. **Provisional guardian ad litem for absent infant defendant.**— Section 473, Code, contains a very peculiar device, by which provision is made for obtaining a judgment against an infant party without either actual or substituted

service of the summons upon him. Its employment is of very doubtful utility and is not recommended.

209. Security by guardian ad litem is not ordinarily required to be given, unless money or property of the infant is received by him, in which case he must give a bond with sureties. (Code, §§ 474-476.)

210. An infant defendant is bound by a judgment, as though an adult, provided that he has been served with a summons, and that a guardian has been appointed for him. (*Matter of Hawley*, 100 N. Y., at p. 211.)

CHAPTER VII.

INCIDENTAL PRACTICE, INCLUDING AMENDMENTS, MOTIONS, ETC.

211. **Amendments.**—In the drafting of papers and in taking the various steps in a litigation, mistakes are often made. In common-law practice, such mistakes and irregularities, even if but clerical errors in the record, had such serious consequences that gross practical injustice resulted. To afford some remedy the statutes of Jeofails were enacted. (Law French “j’ay faillé,” *i. e.*, “I have failed.”) The New York statute of Jeofails is contained in sections 721 and 722 of the Code. It provides substantially that mere formal defects and omissions in the proceedings, *if there has been a trial*, shall be ignored, or corrected as a matter of course. The idea is that if the parties have come before the court and tried their issues, the circumstance that there has been some incidental error in the prior formal proceedings, shall not interfere with the validity of the judgment. It is obvious, for instance, that everything connected with the summons and its service, howsoever important in the first stage of the action, becomes substantially unimportant if the parties try their case on the merits. Questions as to regularity and formality of the proceedings prior to the trial should therefore be raised, if at all, before the trial comes on.

If the court once acquires jurisdiction of an action or proceeding, it may incidentally to its jurisdiction, upon motion, amend any process, pleading, or proceeding. (Code, § 723; *Christal v. Kelly*, 88 N. Y. 285.)

But if the court has failed in acquiring jurisdiction, it has no lawful authority to do *anything* in the action or proceeding. Hence the expression that a mistake in a proceeding upon which jurisdiction depends, cannot be amended.

For instance, the service of a summons by publication is a jurisdictional proceeding. If the various steps specified in the statute are taken, the court acquires jurisdiction, but if any one be not taken there is a failure to acquire jurisdiction and the mistake cannot be corrected by amendment. The only thing to do, in such a case, is to begin over again. (*Kendall v. Washburn*, 14 How. Pr. 380.)

So, the granting of a provisional remedy (arrest, injunction, or attachment) is a jurisdictional proceeding. The law gives to a judge, in such case, authority to grant an order or a warrant, upon condition that certain papers are submitted to him. If such papers be deficient, he simply has no lawful right to do anything in the matter except to deny the application; and if he do otherwise, the court has no lawful authority to do anything excepting to vacate the order or warrant improperly granted. It cannot in such case patch up the deficiencies by amendment, because the proceedings are jurisdictional. (*Harris v. Durkee*, 50 N. Y. Super. 202.)

212. Motions to amend may be made with respect to any process, pleading, or proceeding *not jurisdictional*. The motion papers consist of an affidavit and notice of motion or order to show cause, and, if the motion is to amend a pleading, a copy of the proposed pleading. The affidavit should set forth the condition of the action, the facts showing the mistake, the excuse, and the necessity for amendment. Any unreasonable delay in moving an amendment may be held, in the discretion of the court, to amount to laches, which is a ground for denial of the favor.

213. Amendments of pleadings upon motion before trial are allowed with great liberality, but there are limits to the power to grant the leave.

1. It is not permitted to amend a complaint by incorporating new facts essential to the complete statement of a cause of action, occurring after the commencement of the action. In such case the action should be discontinued and a new one commenced. This is upon the principle that the cause of action must be complete when the action is commenced.

A new defense, however, occurring after the commencement of the action, may be interposed by amendment of the answer.

2. Whether an amendment to a complaint may be permitted substituting an entirely new cause of action for the one originally pleaded, has been a question upon which the decisions have differed. In *Davis v. N. Y., L. E. & W. R. R. Co.*, 110 N. Y. 646, it is held that a fair test to determine whether a proposed amendment of a complaint is allowable under section 723, Code, is, would a recovery on the original complaint be a bar to a recovery upon the amended complaint?

Under this rule, of course, any material averment omitted in the original complaint with reference to the transaction therein described, may be supplied by amendment; and, further, that even the nature of the action may be changed by amendment. It is, for example, permissible by amendment to change an action for the breach of a warranty to one for damages for deceit. In such a case it is putting the facts of the same transaction into a different form upon a different theory of the plaintiff's right. (*Eighmie v. Taylor*, 39 Hun, 366.)

A late case in the Court of Appeals (*Deyo v. Morss*, 144 N. Y. 216) gives a very wide scope to the power of the court, to permit amendments to the complaint.

It is also permissible to add by amendment new causes of action to a complaint, in addition to those already sued upon, provided the added causes were complete at the time the action was commenced, and that the added causes were in their nature such as to permit their being originally joined, and this power has been extended to the case where the added causes would have been barred by the statute of limitation but for the order permitting them to be brought in by amendment. (*Hatch v. Central Bank*, 78 N. Y. 487.)

With reference to the amendment of answers the power of the court is complete to permit any new or different defense to be interposed by amendment "in furtherance of justice."

214. Amendments of summonses.—A summons which is simply irregular in some particular may, upon motion, be amended, while if the defect be so substantial as to make the paper a nullity it may not be amended. (See Par. 14, *supra*.)

For instance if the county of trial has been omitted, it may be supplied by amendment. (*Wallace v. Dimmick*, 24 Hun, 635.)

Or a name may be corrected, or the real name of the defendant substituted for a fictitious designation. (*Betts v. Betts*, 4 Abb. N. C. 317, and note on p. 323; *Skoog v. N. Y. Novelty Co.*, 4 Civ. Proc. 144.)

But it is not permitted by amendment of the summons to substitute a different person for the one sued. (*N. Y. State Monitor Co. v. Remington*, 89 N. Y. 22.)

215. Amendments of pleadings at the trial to conform pleadings to proofs have already been considered. (Par. 127, *supra*.)

216. Amendments after the trial may not be made nearly so freely as in the earlier stages of the action.

An amendment of a pleading after a trial will only be permitted to sustain a judgment—never in aid of an effort to overthrow it. (*Volkening v. De Graaf*, 81 N. Y. 268.)

But, subject to this qualification, an amendment to conform pleading to proof, unless it *substantially* change the cause of action or defense, may be permitted, even upon an appeal, and by the Appellate Division or Court of Appeals. (*Harris v. Tumbidge*, 83 N. Y. 93; *Southwick v. First Nat. Bank*, 84 N. Y. 420.)

217. Amendments of affidavits, as to defects or omissions therein may be made, excepting where the affidavit is the foundation of jurisdiction, in which case it may not be amended. (Par. 210, *supra*.)

218. Amendments of verdicts.—The court has no power to trespass upon the province of the jury. Its power to amend verdicts is therefore confined to cases where it plainly appears that the clearly expressed determination of

the jury is not shown in the verdict as it stands recorded. (*Hodgkins v. Mead*, 119 N. Y. 166.)

219. Amendments of judgments.— With respect to judgments it is held broadly that the power of the court is not limited by the Code, but that it has inherent authority over its own judgments, and may in furtherance of justice, upon application of any party, open and amend them. (*Ladd v. Stevenson*, 112 N. Y. 325.)

220. Opening defaults.— Analogous to the power of amendments is that of opening defaults—that is, where a judgment or order has been made upon the default of the adverse party, he may be given an opportunity to have a hearing, and reinstated in the position occupied by him prior to the default. (Code, § 724.) Upon such motions it is always necessary to draw affidavits setting forth the proceedings and the facts showing the applicant's excuse. If the motion be by a defendant to open a judgment taken against him for his default in pleading, he must make as part of his motion papers the answer which he asks leave to interpose, and an affidavit of merits.

221. Terms upon granting motions to amend and to open defaults.— Such orders may be made upon such conditions and terms as to payment of costs, etc., as the court may in its discretion impose. An amendment of a pleading may now be made, if the court so direct, without disturbing the action in its place on the calendar. (Code Amendment of 1900 to § 723.)

222. Motions and orders —General classification.— In its broadest sense the term “motion” includes every application to a court or a judge for an order. In this sense the only proceedings in court which are not motions are trials of issues of fact. It is in this broadest sense that motions are considered and divided in Rule 38 of the General Rules of Practice. Certain proceedings are therein *enumerated*, and hence termed “enumerated motions.” It will be seen that the scope of an enumerated motion is so wide that its determination disposes of the issues; while a nonenumerated mo-

tion, under which designation fall all motions other than those included in the enumerated class, concerns merely some matter incidental to the main course of the litigation.

When we speak of a "motion" in the generally understood meaning of the term, we mean one of the nonenumerated or incidental class. Such motions are divided into two general classes: 1. Contested. 2. *Ex parte*.

A contested motion is one which must be presented after notice to the adverse party, so that he may have an opportunity to oppose or contest it; while an *ex parte* motion is made without such notice or opportunity. The general principle is that if a motion is made, notice must be given to the adverse party, so that *ex parte* motions are the exception. Express authority by statute must be found in order to authorize a judge of a court to make an order without notice. The commonest examples of *ex parte* motions are motions to extend time, for orders to show cause, and applications for provisional remedies in actions; and in special proceedings, orders supplementary to execution, for State writs, etc.

223. Motions in Supreme Court, where made.—The Supreme Court is a State institution, but for the purpose of transacting its business of original jurisdiction is divided into districts, all of the judicial districts, excepting the First, including several counties. The First District includes only the county of New York. When an action is commenced, we have seen that it is required that the county for trial shall be named in the summons. Any contested motion thereafter made in the action may be made in that county, or any other county in the same judicial district, or in any adjoining county, whether in the same district or not.

As to the county of New York (the first judicial district) the regulation is made that all motions in actions triable in that county must be made therein, and no motion shall be made therein in actions triable in other counties whether adjoining or not. (Code, §§ 769, 770.)

224. Ex parte orders — By whom made and vacated.—In actions in the Supreme Court, orders therein, not required

to be made upon notice, may be made by any judge of the court anywhere in the State, or by a county judge within his own county, or in that where the attorney for the applicant resides. An *ex parte* order may be vacated without notice by the judge who made it, or upon notice by such judge or by the court. (Code, § 772.)

225. Motion papers generally.—The facts which it is desired to bring to the attention of the court or judge before whom the motion is made are presented in affidavits, and, where notice is required, it is given either by a notice of motion, or order to show cause. In the preparation of motion papers as well as of all other papers used in legal proceedings, the provisions of Rule 19 of the General Rules of Practice, designed to require legible documents upon fairly durable paper, must be complied with. (See also Code, § 796.) Such papers must also be marked with folio numbers. Should the provisions of this rule be not complied with, the remedy of the party upon whom the imperfect papers are served is to return them within twenty-four hours after their service with a statement of the particular objection to the receipt.

In contested motions copies of the motion papers must be served upon the adverse attorney, the required time before the day named for the hearing of the motion. Only such papers or those referred to therein and already on the files can be used upon the hearing. If additional affidavits are required, permission of the court must be given before they can be used.

226. Affidavits, requisites of.—It is the proper practice to entitle the affidavit with the title of the action or special proceeding, if such be pending. If the affidavit is used as preliminary to some action or proceeding, it need not be entitled.

The venue (*i. e.*, "County of New York, ss.") should commence the body of the affidavit, and if the proceeding be jurisdictional, the mistake of omitting the venue cannot be corrected by amendment. The necessity of a venue is found

in the principle that an affidavit should show on its face that it was taken by a duly authorized official in the place where he has authority to act. (*Thompson v. Burhans*, 61 N. Y. at p. 63.)

Immediately after the venue should follow the name of the deponent, for instance, "John Doe, being duly sworn, says," although the inadvertent omission of the name of the deponent in the body of an affidavit signed by him has been held not to be a fatal defect. (*People v. Sutherland*, 81 N. Y. 1.)

It is important that every fact which it is intended to establish by the affidavit should follow and not precede the phrase "being duly sworn, says." (*Staples v. Fairchild*, 3 N. Y. 41; *Payne v. Young*, 8 N. Y. 158.)

At the foot of the affidavit, the deponent should sign his name, and an omission of his signature makes the paper a nullity, although if the original be signed, an unsigned copy which has been served may be corrected and a motion will not be dismissed because of the omission. (See cases cited under Rule 21 of Hun's Edition of the General Rules of Practice.) And, finally the jurat should be added (*i. e.*, "Sworn to before me, this . . . day of . . . , 1903), and signed by the officer administering the oath, who should add his official title and the county within which he is permitted to act, although it is held that where a notary omits to add the name of his county it will be presumed that he acted within the county of his authority. (*Crosier v. Cornell Co.*, 27 Hun, 215.)

227. Who may take affidavits.—The officials who are authorized to administer oaths within the State are enumerated in section 842, Code. They may be summarized as judges and court clerks, notaries public, and commissioners of deeds.

An affidavit taken *within the State* before any such official requires no further authentication than his signature to the jurat.

Where the affidavit is made outside the State for use within the State it may be taken before any official authorized

by the laws of this State to take acknowledgments of deeds outside the State to be recorded here, so that in order to find out what nonresident official may take an affidavit for use in this State we must inquire whether our laws authorize him to take the acknowledgment of a deed; if so, he may *ex officio* also take an affidavit. The statute concerning acknowledgments is included within the "Real Property Law," and section 249 thereof designates the officials who may take acknowledgments to deeds of New York property within the United States, outside of New York.

They may be summarized as the judges of the more important courts, either State or United States, the mayors of cities, New York commissioners resident in the foreign State, and any officer of a State authorized by the laws thereof to take the acknowledgment or proof of deeds to be recorded therein.

If the acknowledgment be taken before a New York commissioner resident in the foreign State his certificate must state the town and county or the city in which it was taken, and must be authenticated also by the certificate of the New York Secretary of State.

If it be taken before a local official authorized by the laws of the foreign State to take acknowledgments it must be authenticated by the certificate of the local county clerk for the county in which the officer has acted.

In either case the certificate of authentication is as to the authority of the officer to take the same and the genuineness of his signature and seal.

The point must be kept in mind that it is authority to take acknowledgments out of the State that gives the authority to take oaths and that it is the former authority which must be authenticated by certificate. (*Turtle v. Turtle*, 31 App. Div. 49.)

Outside the United States, the diplomatic and commercial representatives of the Federal Government are authorized to take acknowledgments, and special authority is given to cer-

tain local officials in Canada and the United Kingdom. (Real Property Law, §§ 250-256, 257-259, 260 and 261.)

228. Notice of motion.—Besides the affidavit or affidavits setting forth the facts upon which the motion is based it is necessary to prepare and serve either a notice of motion or order to show cause.

The notice of motion is entitled in the action, and contains a notice of the nature of the motion and the time and place when and where the hearing will be brought on. It should make explicit reference to the papers which will be used in support of the motion, and if the motion be based upon some irregularity in the proceedings of the adverse party, the irregularity complained of should be pointed out in the notice. (Rule 37, General Rules of Practice.)

You cannot obtain by the motion any more than you ask for in the notice. It is consequently usual, in order to include the right to obtain any incidental direction in the order, to add in the notice of motion after the statement of the precise motion which it is intended to make, the phrase, "and for such other order as may be just." Contested motions in the more populous districts of the State (New York, Kings, and Erie counties), are made in Special Terms of the court, especially devoted to the hearing of motions. In New York county two Special Terms sit during the entire year to hear and dispose of motions,—Part One for contested motions and Part Two for *ex parte* business.

In other parts of the State motions are disposed of at the regular Trial Terms generally on the opening day and at other times fixed by local rules. (Rule 21, General Rules of Practice.)

229. Time for service of notice of motion.—Unless the time is shortened through an order to show cause, hereafter referred to, the time for service of motion papers is eight days, except that where the attorneys reside or have their offices in the same city or village, five days' notice is sufficient. (Code, § 780; General Rules of Practice, Rule 37.)

230. Orders to show cause.— When, for any reason, it is desirable to bring on the hearing of a motion in less time than after the required notice; or when, pending the motion, and before its hearing and decision, it is desired to stay the proceedings of, or enjoin the adverse party, or to extend time, an order to show cause is employed instead of a notice of motion. An order to show cause determines nothing. It is simply a means of bringing on a motion to be heard, with, possibly, some of the incidents mentioned, having the purpose of preserving the *status quo* until the motion is heard and disposed of.

An order to show cause may be made by either the court or a judge. (Code, § 780.) In practice it is usually made by a judge. It should contain the same particulars as to the character of the motion, the papers on which it is to be heard, and the time and place of hearing that are required in a notice of motion. When an order to show cause is applied for, the moving affidavit must contain some further particulars in order to justify it, namely, a statement showing why a shorter notice than that usually required is necessary, a statement showing the condition of the action, whether it is at issue, and if not tried, the time of holding the next Trial Term; and the order to show cause must contain a special provision directing the time for its service. (Code, § 780, and Rule 37.)

231. Proceedings upon the hearing of the motion.— At the time stated in the notice of motion or order to show cause, the motion comes before the court for hearing. If the moving party be present, and there be no one present to oppose, he files his papers and, if they be sufficient on their face, has his motion granted by default. If the moving party fail to appear, the adverse party may enter an order denying the motion by default.

If both parties appear and the opposing party desires to raise any point that, by reason of irregularity in the motion papers or their service, the motion should not be heard, he must state his preliminary objections before the argument

upon the main question is commenced — otherwise he waives them.

If there be no preliminary objections, or if such having been raised, they are overruled, the argument of the motion proceeds. The attorney for the moving party states the facts supported by his affidavits and argues in favor of his motion. Then the attorney for the opposing party states the facts contained in his contesting affidavits and argues in opposition to the motion. The moving attorney may then reply. It is within the discretion of the court to direct the motion to stand over for further proofs either by affidavit or before a referee, but this power is very sparingly exercised.

The principles of *res adjudicata* are applied to motions as well as to judgments. (*Riggs v. Pursell*, 74 N. Y., at p. 376; Code, § 776.)

232. The order.— After a motion has been made and the papers submitted, either immediately or after deliberation, the judge who has presided at the hearing of the motion announces his decision. It then becomes necessary for the attorney for the successful party on the motion, to prepare, for signature and entry, the order.

We have frequently had occasion to distinguish between court orders and judge's orders. A limited class of orders may be made by a judge out of court. Such orders are the *personal* official act of the magistrate, and not that of the court of which he is a member.

As contested motions are always made in court, they are disposed of in a court order which is *impersonal* in its substance and form, being, as it is, the determination of the court upon the matter in controversy upon the motion.

Such orders are always commenced with a caption (*i. e.*, "At a Special Term of the Supreme Court") showing the court, time, and place of the order, with the name of the judge presiding at the hearing of the motion. The caption is followed by the title of the action, and the title by the introductory or recital part of the order, in which the character of the motion is indicated, the papers mentioned upon which

it was heard (*pro* and *con*), and the names of the counsel arguing the motion. After the introductory — or recital — part showing the facts indicated, the purpose of which is to make a record which may be referred to to determine what was before the court on the hearing of the motion, follows the ordering part, after the phrase, "It is ordered." The ordering part should contain as concisely as possible the judicial determination upon the motion, following the disposition which the judge has indicated.

It is a usual practice to prepare the form of order and submit a copy to the adverse attorney, with a notice of settlement (of two days), to the effect that at a certain designated time and place the proposed order will be submitted for signature to the judge who decided the motion. An opportunity is thus given the adverse attorney to suggest any corrections in the form of the order which he may deem proper. Should an order be entered without notice of settlement, which the adverse attorney deems to be improper or defective in form, he may move that it be resettled and corrected. When the terms of the order have thus been settled, the judge signs it with his initials or name following the word "enter." This word is a direction to the court clerk upon which he enters the order in the records kept by him, and files it in his office with the papers upon which the motion was heard. When such entry and filing are completed, the order becomes an order of the court upon the matter determined by the motion. (Rule 3, General Rules of Practice.) This entry and filing are made in the county in which the action is triable, where the complete record of the action is kept.

233. Renewal or rehearing of motions.—"In its theory the policy of the Code has been to prevent one judge from reconsidering and reviewing the orders which upon motion may have been heard and decided in a court held by another. And that policy has been ordinarily observed and carried into effect by the determination of the courts themselves before the enactment even of the present Code; and the rule has been very generally adopted and observed where the order

complained of has not been obtained by collusion, or there is not an absence of jurisdiction in the tribunal directing it, in either of which cases it may be disregarded, to require the application for its reconsideration, *when that is not to be made by a direct appeal from it*, to be made in a court held by the same justice originally directing it. * * * This rule has been very uniformly adhered to, to avoid the unseemly conflict which would otherwise necessarily arise between courts possessing co-ordinate authority, and a departure from its observance has only been sanctioned in exceptional cases." (*People v. National Trust Co.*, 31 Hun, at 26.)

Section 776, Code, partially declares this principle. As to the excepted case of an order made without jurisdiction, see *Kamp v. Kamp*, 59 N. Y. 212.

Where a motion is denied because of some deficiency of proofs or irregularity in practice, it is usual to provide, in the order denying the motion, that the denial is without prejudice to a renewal of the motion upon new papers.

234. Stays of proceedings upon an *ex parte* order can be no longer than for twenty days. (Code, § 775.)

235. Costs of motion.—Whether costs shall be given upon the determination of a motion, either absolutely or conditionally, is a matter entirely within the discretion of the court. Section 779, Code, provides for an execution for motion costs, and for a stay of the proceedings of the party in default. The execution is rarely employed, and attorneys are not generally particular about enforcing the stay.

CHAPTER VIII.

INCIDENTAL PRACTICE — CONTINUED.

Extensions of Time — Service of Papers — Bonds and Undertakings — Tenders and Offers — Death of Parties — Change of Place of Trial, Etc.

236. Extensions of time.— We have already considered the subject of extension of time to answer. (Par. 116.)

Extensions in general are governed by Code, §§ 781-785. These rules may be summarized as follows:

1. *Before* the time limited for the service of any paper, or the taking of any proceeding, has expired (with the exceptions hereafter noted) either the *court* or a *judge* may by order enlarge the time. This application may be made *ex parte*. It is essential to the potency of the order made thereon that a copy of the affidavit upon which it was granted be served with it — otherwise the order may be disregarded.

2. *After* the expiration of the time limited for the service of any paper or the taking of any proceeding — that is to say, when a party is in default — the *court* may upon motion relieve him from the consequences of his omission (“open the default”) upon such terms as justice requires. Such motions, unlike motions to enlarge time, can be made only upon notice.

3. There are certain *matters excepted* from these general rules, where neither court nor judge is permitted to enlarge time, or open default, viz.:

a. The time limited by law within which an action must be commenced (*i. e.*, under the “statute of limitations” contained in Chapter IV of the Code).

b. The time limited to continue an action in case of death or disability.

c. The time fixed by the court to serve a supplemental complaint in the case of continuance of an action.

d. The time within which an appeal may be taken, excepting where a party dies pending his right to take an appeal, in which excepted case alone such time may be enlarged. (Code, §§ 780-785.)

237. Time, how computed.— By excluding the first and including the last day. Where the last day falls on Sunday or a legal holiday, that, too, is excluded. Where two days' notice is required and an intervening day is Sunday or a holiday, it is excluded. (Statutory Construction Act, § 27; formerly contained in Code, § 788.)

238. The service of papers.— The summons, as we have seen, must be served upon the defendant himself, and in the special method provided, but the action having been thus commenced, all subsequent services of interlocutory papers are made between the attorneys representing the parties; but even after appearance, if it is desired to subject the defendant to any *personal* proceeding, requiring his personal attendance, he must be served as well as his attorney. If a party after service of the summons fails to appear, service of papers in the ordinary proceedings in an action need not be made upon him unless he be confined in jail under civil arrest. (Code, §§ 799, 802.)

239. Methods of service of interlocutory papers on an attorney.

1. By delivering a copy to him in person.

2. By mail; by depositing a copy properly inclosed in a post-paid wrapper in the post-office of the attorney making the service, directed to the attorney upon whom service is to be made at the address designated by him. The deposit in the mail may be made at such post-office, or in any post-office box under the care of the government. (Code, § 797.)

Service by mail may be made by depositing in the mail the paper at any hour of the last day on which service may be made. (*Green v. Warren*, 14 Hun, 434.) And the service is complete, although the paper be delayed or lost in the mail.

3. By delivering a copy to the person in charge of the attorney's office, provided he be absent therefrom. (See *Gross v. Clark*, 1 Civ. Proc. 17.)

4. By leaving the copy in a conspicuous place in the attorney's office between 6 A. M. and 9 P. M., provided the office be open, and no one in charge. If there be an office letter-box, then by leaving the paper therein, inclosed in an envelope directed to the attorney.

It is improper to have an office opened, or to throw the paper through a fanlight or under the door. (*Haight v. Moore*, 36 N. Y. Super. 294; *Vail v. Lane*, 4 Hun, 653; *Clafflin v. Du Bois*, 13 Civ. Proc. 234.)

5. By leaving the copy at the attorney's residence within the State, with a person of suitable age and discretion, provided his office be closed and no letter-box there provided. (Code, § 797.)

On a party appearing in person:

1. By personal delivery.

2. By mail, same as on attorney.

3. By delivery at residence within the State to person of suitable age and discretion, between 6 A. M. and 9 P. M. (Code, § 797.)

Irregularities in service are waived, if the paper is received by the attorney, and not promptly returned by him, with a notice of the irregularity.

240. Double time after service by mail.— Where the time within which a party may take action is limited to a certain period after the service of a paper, if such service be by mail, double the time usually limited is allowed; and double notice must likewise be given when served by mail. (Examples: Forty days to answer after service of complaint by mail; forty days to amend after such service; ten or sixteen days' notice of motion — instead of the usual five or eight days' notice.)

Notice of trial may, however, by express provision, be served by mail sixteen days (instead of the usual fourteen) before the term. (Code, § 798.)

241. Bonds and undertakings.—It is often required in legal proceedings that a party who seeks to avail himself of certain remedies shall, as a condition, give security for the benefit of the party against whom he is proceeding, in the form either of a bond or undertaking. For instance, in some cases a plaintiff is required to give security for costs; when an appeal is taken, security is required to stay the proceedings from the judgment appealed from; and upon the granting of a warrant of attachment, order of arrest, or injunction order, an undertaking is necessary. Then, too, whenever a court or judge appoints a person to take charge of or receive the property of some one else (for example, a guardian, or a receiver, or an administrator) security for the faithful performance of his duties is required, upon his appointment.

The particular requirements concerning each special kind of bond or undertaking are mentioned in connection with the proceedings in which they are used, but sections 810-816 of the Code contain provisions generally applicable to all.

An undertaking is a promise in writing to pay a certain amount in a certain event. In the early days of the Code questions arose as to whether an undertaking was a valid contract, inasmuch as many of the elements of a contract may be lacking. The simple way out of the difficulty lay in the adoption of the principle that an undertaking creates a *statutory* liability, and that it is unnecessary to apply contractual tests to hold the sureties. (*Thompson v. Blanchard*, 3 N. Y. 335.) The rights and obligations of sureties upon either bonds or undertakings are substantially the same.

The formal general rules applicable to all bonds and undertakings may be summarized as follows:

1. All bonds and undertakings must be acknowledged, or proved and certified, in like manner as a deed to be recorded. (§ 810.)
2. Unless required by express provision, the principal need not join in the execution. (§ 811.)
3. One surety is sufficient in the absence of express provision to the contrary. (§ 811.)

4. The qualifications of a surety are that he must be a *resident* of the State; either a *freeholder* or *householder* therein (that is, either own or hire real property), and worth twice the sum of his obligation, over all the debts and liabilities which he owes or has incurred, and exclusive of property exempt by law from levy and sale under an execution. (§ 812.)

5. Surety companies may be used as sureties. Where an undertaking is executed by one of these companies no other surety is required, and an official examination takes the place of an ordinary justification. (L. 1885, chap. 401.)

6. Attorneys and counselors are not permitted to act as sureties upon any bond or undertaking. (Rule 5, General Rules of Practice.)

7. Bond or undertaking must be approved by court or judge, unless otherwise expressly provided. (§ 812.)

8. Where a bond or undertaking is for five thousand dollars or more, there may be more than two sureties. (§ 812.)

9. Sureties may be relieved upon taking proceeding described in section 812.

10. Where a bond or undertaking is in form made to The People of the State, the real party in interest may maintain an action thereon, upon obtaining permission of the court. (§ 814.)

11. A change of parties to the action does not affect obligations of sureties. (§ 815.)

12. All bonds and undertakings must be filed. (§ 816; Rule 4, General Rules of Practice.)

13. Formal defects, if there be substantial conformity, do not prejudice and may be amended. (Code, §§ 729, 730.)

242. Tenders and offers.—At common law in actions upon a money demand for an amount definite, or capable of being made so by computation, a plea of tender was sustained where the defendant had, *before action*, tendered to the plaintiff the sum due him.

A tender did not of course *discharge* an obligation, as payment would, but it served to stop interest from the time it

was made, and to entitle the defendant to costs, if the plaintiff recovered no greater amount than that tendered.

The Code does not change the law as to tender before action, but extends the remedy so that it may be used after action brought, and makes regulations as to the extended remedy only. (Code, §§ 731-734.)

Tender under the Code (*i. e.*, after action brought) may be made in any action to recover money for liquidated damages, or in one class of actions for unliquidated damages, namely, actions to recover damages for negligence. The tender is of the amount which the defendant conceives to be due the plaintiff with the accrued costs up to the time the tender is made. (§ 731.)

A tender after suit has no effect unless it is accepted, or paid into court. (§ 732.)

A tender made either before or after action brought, to be effectual for any purpose, must be:

1. Absolute and unconditional.
2. Made by the debtor or his agent.
3. Made in legal tender money.

For applications of the principle that tender must be absolute, and its limitations, see *Noyes v. Wyckoff*, 114 N. Y. 204; *Cass v. Higenbotam*, 100 N. Y. 248; *Halpin v. Phenix Ins. Co.*, 118 N. Y. 165.

243. Legal tender money.—Gold and silver coin and United States legal tender notes constitute the sole legal tender money. Coin certificates and national bank currency, while serving for every-day purposes as money, are not legal tender.

United States legislation and the decisions of the courts thereupon must be consulted.

The following are the principal statutes: Legal Tender Acts of February 25, 1862; July 11, 1862; March 3, 1863. National Banking Acts, February 25, 1863; June 3, 1864; March 3, 1865; July 12, 1870. Legislative Declaration as to payment of obligations in coin, March 18, 1869; Coinage Act, February 12, 1873; Silver Purchase and Coinage Act,

February 28, 1878; Silver Bullion and Coin Note Act, July 14, 1890; Repeal Act, November 1, 1893; Gold Standard Act, March 14, 1900. And the following are the principal decisions: *Hepburn v. Griswold*, 8 Wall. (U. S.) 603; *Knox v. Lee*; *Parker v. Davis*, 12 Wall. (U. S.) 457; *Juillard v. Greenman*, 110 U. S. 421.

244. The legal effect of a tender made by the defendant is that it places him in the position of admitting the contract or duty sued upon, and the right of the plaintiff to the sum tendered. But the defendant may defend against any claim beyond the sum tendered, upon any ground consistent with an admission of the original cause of action. (*Wilson v. Doran*, 110 N. Y. 101.)

Money paid into court pursuant to a tender becomes the property of the plaintiff regardless of the result of the action. (*Taylor v. Brooklyn Elevated R. R. Co.*, 119 N. Y. 561.)

If it turns out upon the trial that the plaintiff is entitled to no more than the sum tendered, the plaintiff can recover neither costs nor interest from the date of tender, but must pay the defendant's costs from that time.

Where the plaintiff recovers more than the sum deposited in court pursuant to a tender, but not withdrawn by him, he should have judgment for the full amount, and then credit the amount deposited on the execution.

If the plaintiff accepts a tender and then proceeds with his action, he obtains judgment for the amount of his established claim less the amount of the tender, and the right of either party to costs depends upon the amount of this difference. (Code, §§ 733, 734; *Kelly v. West*, 36 N. Y. Super. 304.)

245. Offers.—1. *To liquidate damages conditionally.* The use of this offer is confined to actions to recover damages for breach of contract. In such cases the defendant may serve *with his answer* a written offer that if he fails in his defense, the damages may be assessed at a specified sum.

If the plaintiff by a notice, served at or before the notice

of trial, accepts the offer, the question as to amount of damages is taken out of the dispute, and if the plaintiff recovers anything, it will be the amount named in the offer.

If the plaintiff fails to accept the offer it has no effect, unless on the trial he does not succeed in recovering a greater sum than that offered, in which event the defendant may offset the expenses incurred by him in preparation for trial of the question of damages. (Code, §§ 736, 737.)

2. *Offer to compromise.* This offer, unlike the offer to liquidate damages conditionally, may be used in any kind of an action, either legal or equitable, excepting, of course, matrimonial actions, in which public policy requires that no judgment shall be made upon the consent of parties. The practice upon this offer is for the defendant's attorney to serve on the plaintiff's attorney a notice containing an offer in plain, unequivocal terms, to allow judgment to be taken against the defendant for a certain sum, or for certain property, or for certain specific relief, with costs. This may be subscribed either by the defendant personally or by his attorney. In the former case the consent should be acknowledged before a notary. In the latter, upon the theory that the general authority of an attorney does not enable him to compromise a suit, he must annex to the offer an affidavit that he is duly authorized to make it in behalf of his client. (Code, § 740.)

This offer, to be effective, must be served not less than ten days before the trial. This time is limited by implication inasmuch as the plaintiff is given ten days in which to avail himself of the offer. (*Herman v. Lyons*, 10 Hun, 111.)

If the offer be accepted it ends the action. In such case a written notice of acceptance, executed either by attorney or party in the same manner as required for the offer, is served within ten days after service of the offer. In the event of acceptance the clerk enters judgment according to the terms of the accepted offer.

If not accepted the offer only affects the rights of the parties in the event that the plaintiff fails to recover a more

liable to the defendant for costs accruing subsequent to the offer, and his recovery will be diminished by the amount of costs from that time.

The judgment entered upon an offer concludes the plaintiff from bringing a new action for any part of the claim embraced in his complaint. (*Robinson v. Marks*, 19 Hun, 325; *Davies v. Mayor*, 93 N. Y. 250.)

246. Death of parties.— The general principle governing the effect of death upon legal proceedings is expressed in Code, § 755, that “An action does not abate by *any* event, if the *cause* of action survives or continues”—that is to say, no matter what happens to either of the parties, whether they become disabled, bankrupt, or dead, the action does not die unless the cause of action itself dies.

The question of the survival of rights and obligations is sometimes complicated by the circumstance that there is more than one plaintiff or defendant, or by the particular stage to which the action has progressed at the time the death occurs. Leaving such questions for the moment we may consider the case of the effect of the death of a sole plaintiff or sole defendant. This is the case covered by section 757, Code which provides that if the cause of action survives or continues the court must, upon a motion, allow or compel the action to be continued by or against the representative or successor in interest. The controlling principles therefore are those which apply to the *Survival of Actions*.

The general principle is that all causes of action based upon property rights, whether in form either in contract or tort, survive, and may be continued through appropriate proceedings in favor of the dead plaintiff's representatives or against the dead defendant's representatives. On the other hand, rights of action for damages for *purely* personal wrongs do not survive and may not be continued after the death of either the party wronged or of the party inflicting the wrong. The development of the common law upon the subject is examined in the case of *Baker v. Crandall*, 78 Mo. 584.

The principle is expressed in the New York statute as follows:

"§ 1. For wrongs done to the property rights or interests of another, for which an action might be maintained against the wrongdoer, such action may be brought by the person injured, or after his death by his executors and administrators, against such wrongdoer, and after his death against *his* executors or administrators, in the same manner and with the like effect in all respects, as actions founded upon contracts.

"§ 2. But the preceding section shall not extend to actions for slander, for libel, or to actions of assault and battery, or false imprisonment, nor to actions in the case for injuries to the person of the plaintiff, or to the person of the testate or intestate of any executor or administrator." (Heydeck-er's General Laws and Revised Statutes, page 4970.)

For a general discussion of this statute and its effect see *Potter v. Van Vranken*, 36 N. Y. 619; *Hegerich v. Keddie*, 99 N. Y. 258.

Some cases not arising within the plain terms of the statute have given occasion for interesting discussions:

For instance, an action to recover damages for breach of promise to marry, held not to survive against executors in *Wade v. Kalbfleisch*, 58 N. Y. 282.

An action, by husband for injuries to wife, held to survive to his administrator upon his death in *Cregin v. Brooklyn Crosstown R. R. Co.*, 75 N. Y. 192; but that administrator was entitled to recover for pecuniary interests of husband only, and not for loss of society, etc. *S. C.*, 83 N. Y. 595.

Actions to recover penalties under statutes, including those authorized to be brought against directors and trustees of corporations for omissions of duty, are held to fall within the class of those which die with the person. (*Stokes v. Stickney*, 96 N. Y. 323; *Blake v. Griswold*, 104 N. Y. 613.)

An action by a father to recover damages for the seduction of his daughter has been held to die with the person of the wrongdoer, but this decision does not seem to harmonize with

that in the Cregin case (*supra*). (*Holliday v. Parker*, 23 Hun, 71.)

Laches in application may be ground for a denial of a motion to continue an action after the death of a party, notwithstanding the language of section 757, Code, to the effect that if the cause of action survives or continues, the court *must* upon motion allow or compel the action to be continued. (*Lyon v. Park*, 111 N. Y. 350.)

247. Continuance of actions by or against more than a single party.— In the case of joint plaintiffs where the right survives, in actions either in tort or contract, the action proceeds, upon the death of one of the plaintiffs, without the necessity or propriety of bringing in the dead party's representatives. The surviving plaintiffs go on with the prosecution of the action, and are independently liable to account to the estate of the dead plaintiff for its share of the recovery. This situation commonly arises where actions are brought by the members of a copartnership and one of them dies pending the action. In such cases a suggestion of the partner's death is made, and the case goes on; and so on, if there be successive deaths, until the last survivor proceeds alone. If he also die the action may then be revived in the name of his personal representative. (Code, §§ 758, 759.) Among these Code regulations concerning procedure an important amendment of the substantive law concerning joint contractual obligations has been interpolated. The old law was that the estate of a person *jointly* liable upon contract was discharged by his death. (*Risley v. Brown*, 67 N. Y. 160.) This is changed by the last sentence of section 758, Code.

In actions of tort, save those of the personal character already considered, against several parties, where one dies, an order may be made continuing the action against his representatives. (*Pierson v. Morgan*, 23 St. Rep. 382.)

248. Devolution of right or obligation through other causes than death.— The title of the Code now under consideration contains provisions not only with reference to the death of parties, but also concerning cases where some other

event has occasioned a transfer of interest or devolution of liability, and section 756 empowers the court in its discretion to make a substitution of parties in such cases.

If such an order be not made, the action continues without change.

249. Proceedings upon application to revive or continue action.— Where, either because of death or other event, there has been a transfer or devolution of right or liability, an application may be made to the court to continue or revive the action by or against a new party. Such an application may be made either by one of the parties to the original action, or by an outside party desiring to be brought in. In the latter case an order may be made directing that the applicant be brought in the action and its proceedings amended accordingly, and the order by itself accomplishes the result; but where the application is made by a party to the action to bring in an outsider, the order may grant the application, but it is necessary to issue and serve a supplemental summons before the new defendant can be brought in. (Code, § 760.)

250. Proceedings to limit time for revival.— It is not the policy of the law to compel a defendant to wait in indefinite uncertainty, when a plaintiff dies during the pendency of the action; and the remedy provided in section 761, Code, was devised to enable the defendant to put the deceased plaintiff's representatives to their election either to proceed within a time limited, or to drop the action.

251. The effect of death occurring after verdict, report or decision.— If an action has proceeded to trial, and the trial has been completed before the death of a party intervenes, the principles already mentioned must be considered with important modifications. A jury trial is completed when the verdict is rendered; a trial by the court is completed when its decision in writing has been made and signed; and a trial upon a reference to hear and determine is completed when the referee's report is delivered. This is the culminating point of the litigation. When it is reached, the rights and obligations of the parties are determined, and all that

remains is to take the formal steps necessary to embalm the determination into a judgment. When either plaintiff or defendant dies after this culminating point of verdict, report, or decision, the statute provides that the formal entry of judgment may be taken without any proceeding to revive or continue the action and in the names of the original parties. (Code, § 763.)

And, furthermore, if an action to recover for a purely personal wrong has progressed to this culminating point before a death intervenes, the action does not abate upon the principles already discussed, but proceeds as in ordinary cases where the right survives. The theory is that the right, therefore of the purely personal character, by the judicial determination fixing the pecuniary value of its breach, has been transmuted into a property right which survives death. (Code, § 764.)

The "decision" mentioned in these sections in association with verdict and report, is the formal paper embodying the determination upon the issues, after trial by the court without a jury. (*Corbett v. Twenty-third St. Ry. Co.*, 114 N. Y. 579.)

252. Effect of revival.—Speaking generally, when an action is revived and continued, the thread of the proceedings is picked up at the point at which they had arrived at the time of the death.

In the language of the Commission of Appeals, "When the action is revived, the issue and proceedings are taken up at the point where death left them. The new or substituted party takes the place of the former one, and the case is revived and proceeds in all respects as if the new party had been in the case from the beginning. The pleadings remain the same, and all the prior proceedings are valid and operative. If any reason exists or has arisen for a change, it is incumbent upon the aggrieved party to apply to the court by motion, where, if the party is entitled to it, relief may be granted." (*Moore v. Hamilton*, 44 N. Y. 666.)

In this case it was held that an order of reference and all

proceedings had and testimony taken thereunder stood after revival.

Of course, if, in a jury trial, a death takes place before verdict, it causes a mistrial which goes for nothing.

253. Consolidation of actions.— We have already seen, in connection with the subject of pleading, that separate causes of action of certain specified classes may, at the outset, be joined in one action; but this course is entirely optional with the plaintiff. He is not obliged to join his different causes in one suit even if they fall within one of the classes in which such a course is permitted. He is at liberty to bring as many different actions as he has causes of action, but in such case the Code has, in sections 817–818, reserved power to the court, in its discretion, to consolidate the different actions into one action. The rules governing the consolidation of actions, briefly stated, are these:

1. The actions must be between the same parties.
2. They must be for causes of action capable in their nature of being joined under the tests provided in section 484.
3. Whether they shall be consolidated or not is a matter entirely within the discretion of the court, and in a case where the interests of the plaintiff would be prejudiced the order will be refused.
4. The actions sought to be consolidated must be pending in the same court unless one of the suits be in the Supreme Court and the other elsewhere, in which case power is given to the Supreme Court to order the latter thence, and there to consolidate. (§ 818.)
5. Subject to the qualifications noted it is usual to grant applications to consolidate, upon a defendant's application, in order to avoid unnecessary costs and expenses.

254. Stay of trial in one action to await result of another.

—Apart from any statutory provision it is held that in actions having the same parties, involving similar issues and to accomplish similar judgments, the court has power to stay proceedings in all save one of the actions which is then

brought to trial. (*Third Avenue R. R. Co. v. Mayor*, 54 N. Y. 159; *Cushman v. Leland*, 93 N. Y. 652.)

255. Interpleader by order.— Among the heads of equity jurisdiction is that of interpleader. This is a device by which a party who finds himself subjected to claims by different parties with reference to the same debt or property, brings the amount claimed or the property in dispute into court, brings also into court the hostile claimants, and leaves them there to fight it out; whereupon he withdraws from the litigation and is protected by an injunction against both parties restraining them from any further proceedings against himself with reference to the subject-matter.

Section 820, Code Civ. Proc., provides a remedy similar in its nature and subject to similar rules as those which govern a bill of interpleader in equity. This is an additional remedy and does not exclude that of suit in equity when appropriate. (*Delaney v. Murphy*, 24 Hun, 503; *Baltimore & O. R. R. Co. v. Arthur*, 90 N. Y. 235; *Crane v. McDonald*, 118 N. Y. 648; *Burritt v. Press Pub. Co.*, 19 App. Div. 609.)

The remedy by motion is confined to applications by the defendant in actions either to recover upon a contract, or in ejectment, or for a chattel. The application must be made before answer and upon proof by affidavit that a person not a party to the action makes a demand against the defendant for the same debt or property, without collusion with him. The application must be made promptly and notice must be given to the plaintiff and to the outside claimant.

Whether the order shall be granted is a matter within the court's discretion. (*Barry v. Mut. Life Ins. Co.*, 53 N. Y. 536.)

If it be granted, the outside claimant is brought in as defendant, and the original defendant is discharged from further liability upon his bringing the money or property in dispute into court.

256. Dismissal of complaint for neglect.

1. *To serve summons.*
2. *To proceed with trial.*

Provision is made in section 821, Code, that, in actions against two or more defendants where the plaintiff "unreasonably neglects to serve the summons" upon one or more of them without whose presence a complete determination of the controversy cannot be had, the court may, in its discretion, upon the application of an appearing defendant, dismiss the complaint as to him.

Section 822 provides a similar remedy in cases where the plaintiff "unreasonably neglects to proceed."

Rule 36 of the General Rules of Practice provides for the first judicial district a criterion to determine "what is unreasonable delay." Under that rule in any issue in that district, where the plaintiff fails to bring on the case for trial according to the ordinary course and practice, the defendant may move to dismiss at any time after "younger issues have been tried in their regular order." This restores in the first district the rule of the common-law practice. (*James v. Shea*, 28 Hun, 74.)

257. Feigned issues.— Under the old chancery practice when it was deemed desirable to obtain the verdict of a jury upon a disputed question of fact, it was accomplished through the instrumentality of what was termed a "feigned issue." A declaration was filed in a common-law court setting forth that the plaintiff and defendant had made a wager upon the disputed fact, and that the plaintiff's contention was the correct one. The defendant in his plea admitted the wager but stood by his version of the disputed fact. Thus, while the basis of the action was the fictitious but admitted wager the issue was upon the disputed fact alone, and the verdict of the jury settling this, one way or the other, was then used in the principal litigation in chancery.

Section 823, Code, abolishes the old proceeding. In its place is provided the practice that in equity cases where the law requires that a jury shall pass upon one or more of the issues of fact, or where the court in its discretion seeks the aid of a jury, an order settling and stating the issues to be tried. (See also Rule 31 of the General Rules of Practice.)

258. Filing summons and pleadings.—The record of a suit, consisting of the summons, pleadings, verdict, or decision, and judgment, is usually not made up and filed until after the trial. Ordinarily the copies of the pleadings are simply exchanged between the attorneys who retain in their possession the originals pending the trial, but if it is for any reason desired by either attorney to have the pleading of the adverse party placed upon the files, he may so insist, and may obtain an *ex parte* order requiring it to be filed or to be deemed abandoned. (Code Civ. Proc., § 824.)

259. Place of trial.—The Code regulations respecting place of trial are applicable to actions in the Supreme Court alone. (§ 991.)

The Supreme Court is a State tribunal having general jurisdiction in law and equity. Its justices are officials of the State, but in the administration of justice its work is divided so as to be done within the respective counties into which the State is divided. We have noted that in drawing a summons and complaint the plaintiff's attorney is required to designate some particular county as the county of trial. In the county so designated, unless changed by order, the subsequent proceedings in the action are had. The law does not leave the plaintiff to his own caprice in designating the county for trial, but makes necessary the observance of certain principles.

At common law, actions were divided, with reference to the selection of a tribunal for trial, into "local" and "transitory." A "local" action had to be tried in the locality where the subject-matter of the action was situated, or wherein the cause of action arose, while a "transitory" action might be tried anywhere. Actions were generally "transitory" in their nature, that is, it made no difference so far as the place of trial was concerned, where the cause of action arose. The "local" actions were exceptional and consisted principally of actions concerning or affecting the title to real estate. All such cases had to be tried in the locality where the real estate was situated. This is still the

Code rule, and a pretty complete list of such actions is given in section 982.

Outside of actions affecting real property, the only local actions under the Code are those mentioned in section 983, consisting of 1. Actions to recover a penalty. 2. Actions against a public official to recover damages for misfeasance or nonfeasance; and 3. Actions to recover a chattel distrained; in each of which the county wherein the cause of action arose must be that selected for the trial. It will be observed that the great mass of litigation is made up of actions not "local" but "transitory." As to the latter, the only restriction upon the plaintiff's choice of a county for trial is that he must select the county of residence of one of the parties at the time of the commencement of the action.

260. If the proper county be not named by plaintiff no notice will be taken of the violation of the rule unless the defendant invokes it, and does so promptly. He must not wait until after his answer, but must either at or before its service make a written demand upon the plaintiff's attorney to change the place of trial to the proper county, naming it. The plaintiff's attorney has five days after service of this notice to consent to the demand, and within ten days thereafter, if he fail to accede to the demand, a motion may be made to compel the change. (Code Civ. Proc., §§ 985-986.)

It is the right of a defendant, if he chooses to make timely assertion of it, to have the place of trial named in the proper county even though there be occasion for changing it again under the rules yet to be considered. (*Veeder v. Baker*, 83 N. Y. 156.)

If the plaintiff originally selects as the county of trial, one in which neither he or the defendant resides, and the defendant makes timely demand for a change to the county of defendant's residence, he is entitled to have it so changed, and the plaintiff then has no right to change to the county of *his* residence, although that might properly have been chosen in

the first instance. (*Rector v. Ridgewood Ice Co.*, 38 Hun, 293.)

261. The power of the court to order a change of county of trial.—Apart from the matter of the selection of the “proper” county for trial, upon the principles already considered, the court is given further power to order a change.

1. Where there appears to be reason that an impartial trial cannot be had in the proper county.

2. For the convenience of witnesses and to promote the ends of justice.

Motions upon either of these grounds are not made until after answer. They may, indeed, be made at any time before the cause is reached for trial, unless the delay amounts to laches. In order to change the place of trial on the ground that an impartial trial cannot be had in the county selected, facts must be shown indicating such a state of local prejudice or excitement concerning the cause as to make a fair trial in the locality substantially impracticable. Such cases are rare. (*Messenger v. Holmes*, 12 Wend. 203; *Moulton v. Beecher*, 1 Abb. N. C. 193-235.)

It is upon the ground that a change will serve the convenience of witnesses that the motion is commonly based. Such a motion may be made by either party. When contested, it is the aim of each party to present as large an array of witnesses as is possible, and the courts scrutinize the lists very sharply. The decisions and rules have established very careful regulations for these motions. They require that the affidavit shall contain the name and residence of each witness; that each witness is material according to the advice of counsel; that the applicant has fully and fairly disclosed to such counsel the facts which he expects to prove by each witness, and that, as he is advised, he cannot safely proceed to trial without their testimony. (Rule 48, General Rules of Practice; *Carpenter v. Continental Ins. Co.*, 31 Hun, 78.)

In disposing of this motion the convenience of resident witnesses alone is considered. That of nonresidents is not

taken into consideration. (*Bowles v. Rome, W. & O. R. R. Co.*, 38 Hun, 507.)

Upon the entry of an order granting the motion, all subsequent proceedings take place in the county to which the change is made, and it is made the duty of the clerk of the county in which the place of trial was first named to make a transfer of all papers in the case to the new county. (Code Civ. Proc., §§ 988-989.)

CHAPTER IX.

EVIDENCE IN ITS RELATION TO PROCEDURE.

262. Introductory.—While the law of evidence is developed and applied in the course of legal proceedings, as, indeed, is every other branch of the substantive law, yet it, in the main, constitutes a distinct topic. There is but a small field wherein the law of evidence overlaps that of procedure, and it is to that field only that our attention is to be given when procedure is the subject in hand. The Code of Civil Procedure, as is often remarked, contains many sections which properly belong to other topics than procedure, and in no other chapter is this more apparent than in Chapter IX, entitled “Evidence,” beginning at section 828, which includes many matters concerning the substantive law of evidence, such as the competency of witnesses, presumptions, etc.

Section 829, for instance, about which a great mass of elucidating, explanatory, and distinguishing decisions has clustered, has nothing to do with procedure. It is designed to prevent an interested survivor to a transaction from testifying to communications with the deceased party.

The methods of producing evidence for use in legal proceedings constitute a part of the law of procedure.

For convenience of examination we may divide the subject into these heads:

1. Procuring the personal attendance of witnesses to testify at a trial.
2. Procuring the testimony of witnesses or parties prior to the trial, for subsequent use, either within or without the State.
3. Formalities for documentary proof.

263. Procuring attendance of witnesses at the trial.—

This is accomplished through the issuance and service of a writ of subpoena. This is a judicial writ, running in the name of The People of the State, tested in the name of any judge of the court in which the action is pending, addressed to the persons whose attendance is required, and containing brief directions as to the time and place of their required attendance. The power to issue subpoenas is one of the general powers conferred upon courts of record, in section 7, Code Civ. Proc. In form, a writ of subpoena has the appearance of being issued out of the clerk's office, and being authenticated by his signature and the seal of the court, but it is the common practice among attorneys to draw the paper in their own offices, and themselves add the clerk's name. As this writ may be issued as a matter of course and without express judicial authority, the practice alluded to is saved by the provisions of section 24, Code Civ. Proc.

264. Service of subpoena.—Service must, of course, be made within the State. The requirements of service are three-fold:

1. The original writ of subpoena must be exhibited to the witness.

2. Either a copy thereof or a "ticket" containing its substance must be delivered to and left with him.

3. His legal fees and mileage must be paid or tendered to him. (Code Civ. Proc., § 852.)

The fees are prescribed in section 3318. They consist of fifty cents for each day's attendance, and if the witness resides more than three miles from the place of attendance, mileage at the rate of eight cents a mile.

To make the service effectual, when the subpoena is served the witness must be paid for one day's attendance, together with the mileage, and if any further attendance is required of him, additional fees must be paid or tendered to him after each day's attendance in court — otherwise his duties under the subpoena are at an end. (*Hurd v. Swan*, 4 Den. 75.)

265. Consequences of disobedience of subpoena.—They are

1. Punishment for contempt.

2. An action for damages sustained by the party aggrieved.

3. An action for fifty dollars penalty.

If the person subpoenaed be a party to the action, the court is empowered, in the event of his disobedience, to strike out his pleading, which, in effect, determines the action against him. (Code Civ. Proc., § 853.)

Nothing short of a case of absolute necessity will serve as an excuse for nonattendance by a witness regularly served. (*People v. Davis*, 15 Wend. 602.)

As to the action to recover the penalty, see *Carrington v. Hutson*, 28 Hun, 371.

266. Extra-judicial subpoenas.—The provisions just considered concern subpoenas used in legal proceedings before the regular courts. Where a board, officer, or tribunal other than an ordinary court, is given authority to issue subpoenas and compel the attendance of witnesses, the methods of exerting this authority and enforcing it are provided in sections 854–857, Code Civ. Proc.

267. Exemptions of witnesses.—A witness under subpoena is entitled to certain exemptions while in attendance in court, and while on his way to and from court. While so engaged, process may not be served upon him: for instance, neither a summons in an action against him may be served (if he be a nonresident), nor may an order for his arrest in *civil* proceedings be executed. (Code Civ. Proc., §§ 860–864; *Frisbie v. Young*, 11 Hun, 474; *Parker v. Marco*, 136 N. Y. 585.)

268. Subpoena duces tecum.—If all that is required is a witness's personal attendance, the ordinary form of subpoena is employed. If it is desired that he should bring with him to court a book, letter, or document in his possession, a subpoena *duces tecum* is used. This, in addition to the ordinary requirement of personal attendance, directs the witness to "bring with him" the paper, or book, or other article of evidence which is wanted.

There are certain restrictions upon the use of this kind of a subpoena:

1. Transcripts of public records, when properly certified, may be used in evidence in place of the originals. Section 866, Code Civ. Proc., provides that such records shall not be removed from the city or town where they are kept without an order of the court specifying why the original instead of a certified copy is necessary.

2. Books of account are only to be produced pursuant to a special order of the court, or unless the subpoena *duces tecum* be served at least five days before the required attendance; and a person subpoenaed to produce a book of account may be relieved from the obligations of the subpoena by order of the court, "upon such terms as justice requires touching the inspection of the book, or any portion thereof, or extracts therefrom, or otherwise." (Code Civ. Proc., § 867.)

3. Public officers subpoenaed to produce papers or records are permitted to obey the subpoena by sending to court the required documents in charge of a subordinate or employee. (Code Civ. Proc., § 869.)

269. Examinations and depositions within the State before trial.—The article of the Code commencing at section 870 and entitled "Depositions taken and to be used within the State," concerns several distinct and separate proceedings, which are not therein, however, distinguished clearly or treated separately. There are provisions here, for instance,

1. For examination of a party in an action before trial.
2. For the perpetuation of testimony.
3. For the examination before trial of a witness not a party.

While there are certain details of practice common to all these proceedings, the principles applicable to each are so different, that they will be here treated separately.

270. Examination of party before trial.—The privilege of examining the adverse party before trial is, evidently, valuable. Viewed from the standpoint of the adverse party,

it is, as evidently, a vexatious privilege, or, at least, with vexatious possibilities. The language of the statute gives the impression that in any kind of an action either party may get an order for the examination of his adversary before trial, and catechise him without limit, yet nothing could be further from the truth. Indeed the statement that no examination before trial of an adverse party could ever be had would be more nearly true. Between these two extremes runs the line of utility for this remedy, but even an approximately exact location of this line is extremely difficult because of the inconsistent decisions of the courts.

The tendency of the earlier decisions under the Code was toward extreme liberality in permitting examinations of parties; then the opposite tendency developed, and, for a time, it seemed almost impossible to obtain an order for such an examination which would stand; and, again, later, a more general use of the remedy has been permitted. It will only be attempted here to make a statement of those general principles respecting this remedy which now seem to be generally accepted and applied. That the examination is not a matter of absolute right, but that the application for the order may be disposed of in the *discretion* of the judge to whom it is made, was settled, after a long period of judicial uncertainty, by the Court of Appeals in *Jenkins v. Putnam*, 106 N. Y. 272.

Premising, then, that these orders are within judicial discretion to grant or refuse, what are the principles which regulate the exercise of this discretion? The answering of this question involves an inquiry into the nature of the remedy, which is not altogether a Code invention. Its prototype existed prior to the Code in the Bill of Discovery which was one of the implements of equity jurisdiction, by which, in certain cases, a complainant might, by compulsory process in chancery, in aid of the prosecution of his rights, compel a defendant to "make discovery," or to disclose, under oath, testimony for the plaintiff. This ancient remedy has been explicitly abolished by the Code, in section 1914

wherein it is provided that "An action cannot be maintained to obtain a discovery under oath in aid of the prosecution or defense of another action." The order for examination of a party before trial was intended to take its place, and the decisions are now settled upon the point that the principles which were applied to bills of discovery in chancery shall test the Code remedy. As the remedy in chancery was not of general application we may therefore conclude that under the Code also, it is only in particular kinds of cases that an order for the examination of an adverse party will stand. These exceptional cases may be grouped as follows:

1. Where the relations between the parties are such that the party seeking the examination has a right to the disclosure of knowledge in the mind of the adverse party, or to inspection of some document in his possession. These are such cases as partnership, or where there is some relation of trust or fiduciary capacity making it the *duty* of a party to give information to the other. In such cases, an examination before the trial is necessary in order to secure to the party seeking it his *rights*. In such cases he has the right to the information sought, not only before trial, but, if need be, before pleading.

2. Where a case of fraud is shown — a class of cases in which it is generally necessary that a plaintiff should be afforded superior facilities, and in which a court is always disposed to grant them, and to permit a plaintiff to probe the mind of a defendant, and to compel a disclosure of such information as he possesses relevant to the plaintiff's cause.

The two classes above noted comprise those in which the bill of discovery was employed in chancery, and as to which no doubt exists concerning the employment of the succeeding remedy under the Code.

There is another general class of actions in which, under the Code, the order may be obtained. It is not so capable of accurate definition as those mentioned, but may be stated, generally, thus.

3. An action of whatever nature, in which information of

some necessary element of the cause of action or defense of the applicant party is within the possession, exclusively, of the adverse party, and it is established upon the application that the applicant party cannot safely go to trial without gaining the information sought. Unless therefore the affidavit upon which the order for examination is made brings the case within one of these classes, the order may be vacated.

That the application is to be tested by the equitable rules of discovery is now settled by a mass of authorities. Chief among these rules is that a party has no right in the preliminary examination of his adversary to seek for anything further than testimony in support of his own case. He is not permitted in the common phrase of the authorities, "to go upon a fishing excursion" to find out his adversary's evidence of *his* case. He is not permitted to gratify his curiosity, or to gain any advantage of position, by prying into his adversary's case, but may, within the lines already indicated, examine his adversary to gain information which he must have to complete his own case. (*Kenney v. Roberts*, 26 Hun, 166; *Adams v. Cavanaugh*, 37 Hun, 232.)

As has been mentioned, the freest use of this remedy is in cases where the party whose examination is sought stands in some confidential relation to the party who seeks it, such as that of a trustee to *cestui que trust*, a guardian to his ward, an agent to his principal, etc.

Examples of this class of cases are found in *Carter v. Good*, 57 Hun, 116; *Matter of Erie Iron Co.*, 90 Hun, 62; *Skinner v. Steele*, 88 Hun, 307.

Examples illustrating the use of the remedy in cases under the other classes are found in *Hutchinson v. Lawrence*, 29 Hun, 450; *Sprague v. Butterworth*, 22 Hun, 502; *Sweeny v. Sturges*, 24 Hun, 162; *Sterne v. Metropolitan Telephone Co.*, 19 App. Div. 316; *Naab v. Stewart*, 32 App. Div. 478.

271. Practice in obtaining order for examination of party before trial.— Such an order is obtained upon an affidavit, the contents of which are prescribed in section 872, Code Civ. Proc. As this section contains provisions as to all the

different sorts of depositions which may be taken, we will extract from it the portions having reference to the particular order in question. This affidavit must contain a statement of the names and residences of all the parties to the action, a statement whether or not any of them have appeared by attorney, and the name and residence or office address of each appearing attorney; a statement of the nature of the action and the substance of the judgment demanded, and, if the application is made by the defendant before answer, or by either party after answer, the nature of the defense; a statement of the name and residence of the person to be examined, and that the testimony of such person is material and necessary for the party making the application, for the prosecution or defense of the action, and, at the option of the applicant, a statement of the place where the person to be examined is sojourning or where he regularly transacts business. Rule 82 requires also that the affidavit shall specify the facts and circumstances which show that the examination is material and necessary. Ordinarily this affidavit should be made by the party himself. Where an attorney or representative has special knowledge of the facts either of them may make it. (*Hale v. Rogers*, 22 Hun, 19.)

An important principle to be kept in mind in preparing an affidavit to obtain an order for examination of an adverse party, is that the relevancy of the testimony sought to be obtained must be shown. To this end it is important that the character of the controversy should be shown by the facts, and the facts sought to be obtained by the examination should be directly and not argumentatively indicated. (*Wayne County Bank v. Brackett*, 31 Hun, 434.)

The order for examination is made upon presentation of the affidavit. Its contents are prescribed in section 873. It is, in the first place, a judge's order as distinguished from a court order. The same care has to be taken in this as in the case of an order of publication, as the court as such is

given no authority to make the order. (*Heishon v. Knickerbocker Life Ins. Co.*, 77 N. Y. 278.)

The judge making the order is given discretion to designate and limit in the order the particular matters as to which the party may be examined. It is also required that particular direction shall be made as to the time and place of examination, which may be had either before a judge or referee; and that the time of service shall also be directed. Such service must be within the State, not more than twenty nor less than five days before the time fixed for examination, unless special circumstances necessitate a different service.

Production of books and papers.— We shall subsequently mention the provisions for an entirely distinct proceeding where a party seeks inspection and discovery of *documentary* evidence in possession of his adversary. The rules which seem to be the outcome of the authorities are these:

1. The use of this order as a substitute for the proceeding for a discovery of books and papers will not be permitted; but

2. Where books and papers are to be used as incidental merely to the oral examination, their production may be compelled by subpoena *duces tecum*. (*Bloodgood v. Slayback*, 62 App. Div. 315.)

Service of the order must in all cases be made by delivering a copy to the person to be examined and paying him regular witness fees. If no attorney has yet appeared for such person, a copy of the affidavit must be delivered also. Service of both affidavit and order must also be made on all appearing attorneys. (§§ 874, 875.)

Physical examination of the plaintiff in an action to recover damages for personal injuries may now be had either incidentally to the oral examination of the plaintiff, or without any oral examination, under the provisions of section 873.

Vacating order for examination before trial.— It is generally considered desirable, from the standpoint of the party to whom the order is directed, if possible, to have it vacated.

Action for this purpose must be taken in time. If the party appear and submit to examination it is then too late for him to make objection. (*Erie Ry. Co. v. Champlain*, 35 How. Pr. 74.)

It may be that the affidavit or order, or both, are defective on their face. In that case it is the right of the party ordered to appear for examination, to apply to the judge signing the order, *ex parte*, to vacate it; or he may wait until the time designated for his examination, appear then and raise his preliminary objections and have them passed upon before he is sworn; or, either in such case, or where the facts are disputed, a regular motion for the vacation of the order may be brought on ahead of the return day.

The usual conduct of the examination is for the party to appear before the judge and take the witness's oath. The counsel and person whose deposition is to be taken then retire and proceed with the examination. If any objections to questions are made, the counsel return to the judge and take his ruling. The examination is then resumed, and so on, until its completion, when the deposition is signed, the party again goes before the judge who again administers the oath and signs the jurat. This deposition may be read in evidence at the trial by *either* party. (§ 881.)

272. Discovery of books and papers.— This proceeding is not, as might be supposed, mentioned in the chapter of the Code relating to evidence, but is provided for in the article relating to miscellaneous interlocutory proceedings.

The principles which govern the application of this remedy are similar in their nature to those applied to examinations before trial, although the details of practice are very different. This also is an extraordinary remedy, the granting of which is within the discretion of the judge, and its use is confined to cases in which its necessity is shown. The remedy was known under chancery practice, but under the Code is applicable to all actions.

Statutory power is conferred upon all courts of record, by section 803, Code Civ. Proc., to compel the production by

a party to an action, for inspection and copy, of a book, document, or other paper in his possession or under his control, relating to the merits of the action or of the defense, and section 804 provides that the General Rules of Practice shall prescribe the cases in which a discovery may be compelled and the proceedings for that purpose when not covered by the Code. Rules 14 to 17 are those relating to the subject. Where the primary object sought is the examination of books or papers, it cannot be accomplished through the method of examining a party before trial, already considered, but the practice designed for discovery, now under consideration, must be pursued.

This practice is not confined to aid in pleading, as might, perhaps, be supposed from the language of Rule 14, but it may also be used after pleading, in preparation for trial. (*Stichter v. Tillinghast*, 43 Hun, 95; *Babbitt v. Crampton*, 1 Civ. Proc. 169.)

As in the case of the examination of a party before trial, an order for discovery will only be made to enable a party to obtain information which is necessary to establish his own case, and not for the purpose of enabling him to pry into his adversary's evidence. (*Sanger v. Seymour*, 42 Hun, 641.)

Again, as in the case of the examination of a party, the remedy is most liberally applied in cases of confidential relationship against the person in whom the confidence was reposed, as for instance, in favor of the *cestui que trust* against the trustee, the principal against the agent, the ward against the guardian, and the like; but the remedy is not confined to such cases. (*Babbitt v. Crampton*, *supra*; *Zimmerman v. Dieckerhoff*, 12 St. Rep. 613.)

273. Practice in obtaining discovery.— This differs materially from that for the examination of a party before trial.

To procure a discovery, the paper upon which the proceeding is instituted is a petition and not an affidavit. This petition prays for an order directing the party against whom the discovery or inspection is sought, to allow it, or in de-

fault thereof, to show cause before the court, at a time and place and upon notice as in the order specified, why the petition should not be granted, and, if necessary, for a stay pending the application. The petition must set forth the facts and circumstances on which the order is asked, and that the books or papers whereof discovery is sought are neither in the possession nor under the control of the applicant party; the facts showing the materiality and necessity of the discovery; the particular information required, and that there are entries in the book or paper referred to, of the matter whereof a discovery is sought. The petition must be verified by the affidavit of the complaint. (§ 805 and Rule 15.)

The form of the order is prescribed in Rule 16. It must specify the mode in which the discovery is to be made, and either one of three specified methods may be directed, viz.: 1. A sworn copy of the paper may required to be delivered to the applicant; 2. Inspection with leave to copy may be allowed; or 3. The party may be required to deposit the book or paper with the clerk.

The order must also specify the time within which discovery or inspection is to be made, or when a deposit is required, the time the deposit shall continue. All of these provisions must be carefully followed. (*Cornish v. Wormser*, 53 Hun, 40.)

An order to show cause in this proceeding is always necessary, giving the party the alternative either of discovering or showing cause why he should not. A peremptory order cannot be made in the first instance. (*Dick v. Phillips*, 41 Hun, 603.)

Vacation of the order. An order for discovery may be vacated by the judge who grants it or by the court, upon satisfactory proof by affidavit:

1. That it ought not to have been granted, or that it has been complied with; or
2. That the party required to make the discovery has not the possession or control of the paper directed to be produced.

The order may be thus vacated upon an independent motion, or the opposing party may await the return of the order to show cause and then present affidavits showing cause why the peremptory order should not be made.

Return of the order to show cause. On this return the court is empowered to make such an order with respect to the discovery as justice requires, and to appoint a referee to direct and superintend the discovery if one be ordered.

Disobedience of final order. In such case a further application to the court must be made to impose a penalty. Upon the hearing of such application, the party against whom the proceeding is taken is given a further opportunity to comply with the order after he has submitted to such terms in the way of costs, etc., as the court may impose upon him. But if he neglects this opportunity, the court is empowered to punish him by dismissing his complaint, or striking out his answer, as the case may require, and direct judgment accordingly, or it may exclude the book or paper as to which discovery is sought, as evidence, and in addition may punish for contempt. (Code Civ. Proc., § 808.)

274. Depositions before action brought.— The proceeding already examined is that designed for the examination of a party to an action after its commencement but before the trial. Provision is made in the same sections for the preservation or perpetuation of the testimony of anticipated parties, or witnesses, with respect to transactions which it is anticipated may be made the subject of a future action. Such proceedings are quite uncommon. (*Merchants' Bank v. Sheehan*, 101 N. Y. 176.)

275. Examination de bene esse of a witness not a party, before trial.— The purpose of this examination is entirely different from that of the party before trial, already considered.

The testimony of an ordinary witness before trial is taken solely to preserve the evidence for use at the trial, in case his incapacity or absence prevents his attendance at the trial; and the circumstances which will warrant taking the

testimony are such as will make the presence of the witness at the trial doubtful and uncertain, and relate to his personal condition and purposes as bearing upon the probability of his future attendance. (*Town of Hancock v. First National Bank*, 93 N. Y. 82.)

This provision cannot be employed to enable a party to frame his pleading. The principles of discovery have nothing to do with examinations of witnesses *de bene esse*. (*Matter of Bryan*, 3 Abb. N. C. 289.)

The affidavit and order for the examination of a witness are similar to those required for the examination of a party, with some differences in particulars which will be noted in examining section 872.

In taking the deposition of a witness all objections are reserved for the trial, and are then passed upon. Herein the practice differs from that in the examination of a party.

The deposition of a witness cannot be read at the trial as a matter of course, but preliminary proof as to the impossibility of his attendance by reason of disability, absence, or death must be given. (Code Civ. Proc., § 882.)

After this preliminary proof has satisfied the court that the witness's attendance at the trial cannot be secured, the deposition is read, objections being made and ruled upon as though the witness were present. (Code Civ. Proc., § 883.)

276. Depositions either of parties or witnesses — Where taken.— A party or a witness may not be required to attend to give his deposition in any other place excepting the county of his residence or the place of his business office. (Code Civ. Proc., § 886.)

277. Depositions taken without the State upon commission for use within the State.— The testimony of a nonresident witness or of one sojourning outside the State can only be obtained through the instrumentality of a commission, unless he choose voluntarily to return to the State at the time of the trial to testify. There are no means of compelling such a return, so if his testimony be needed, and no

arrangements for personal attendance can be made, a commission is issued, under which the deposition is taken in writing and returned to be used in evidence at the trial.

The steps in their order for the procuring of testimony on commission are these: 1. Order for a commission; 2. Settlement of interrogatories; 3. Issuance, execution, and return of commission.

1. The order for a commission is issued, almost as a matter of course, upon notice, in any legal proceeding in which testimony may be used. It is quite usual for the attorney for adverse party to consent to such an order provided the request be made seasonably, and so save the unnecessary trouble of a motion.

But if such consent be not obtained it is necessary to make a formal motion upon affidavit and notice or order to show cause. The affidavit sets forth the nature of the action, its status, and that the testimony sought to be taken is material to the applicant's case. (Code Civ. Proc., § 887.)

The order made as a result of granting this motion may in form be either a court or judge's order and should direct that a commission be issued to a person named as commissioner for the examination of certain designated witnesses, at certain places. It should also contain directions for the return of the commission, and if such directions are not contained in the order, they must be included in the commission itself. (§ 892.)

After the order is issued or entered it next becomes the business of the attorney on whose motion the order has been made, to draw and have issued the commission, and to draw and have settled the interrogatories to be annexed.

The commission runs in the name of The People of the State and is addressed to the commissioner named in the order, setting forth the names of the witnesses to be examined, the title of the action, and the statutory directions as to the details of the execution. These directions are contained in sections 901 and 902, copies of which are required by the statute to be indorsed or annexed to each commission.

2. The interrogatories consist of the written questions which the party procuring the commission desires to have put by the commissioner to the witness. Each interrogatory should be numbered and should contain the questions in proper and legal form. If there is more than one witness to be examined, and the questions to be propounded to each witness are not the same, it is necessary to draft a separate set of interrogatories for each witness.

The proposed interrogatories are then served on the adverse attorney, who then has the right to prepare and serve cross-interrogatories. The interrogatories and cross interrogatories are then upon notice submitted for settlement to a judge, unless they are settled by the consent of the attorneys. (Rule 20.)

3. The commission, under authority of the order, is signed and sealed by the clerk, and the interrogatories being annexed thereto, is sent to the person designated as commissioner. He procures the attendance before him of the witnesses, administers the oath to each, reads to each the interrogatories and takes down in writing the answers. The commission is then returned, with the depositions annexed and certified, to the clerk of the court.

278. Other methods for taking testimony out of the State are provided in the statute, but as, practically, their use is confined to cases in which parties consent, they will be but briefly mentioned.

The first of these other varieties is the commission to examine upon oral questions. The order for a commission in such case provides that the witnesses be examined orally, instead of providing for written interrogatories. The execution of such a commission of course necessitates the attendance of counsel to examine the witnesses, and, because of the expense thus necessarily involved, the courts rarely grant an order for such a commission if the motion therefor be opposed. Another variety provided for is where the witnesses are not named, that is, the commission is drawn gen-

erally for the examination of witnesses for the plaintiff (or defendant). (§§ 893-896.)

Still another method for taking depositions out of the State is provided in section 898, under which neither commissioner or witnesses are designated. The order simply directs that depositions be taken, specify the time within which they must be taken, and the manner of their return. The officials before whom such depositions may be taken and the practice in taking them is prescribed in section 899.

279. Suppression of depositions.— If it be desired to raise any question as to the regularity of the execution of a commission it must be done by motion to suppress the depositions, which motion must be made before the trial comes on. (§ 910; *Wright v. Cabot*, 89 N. Y. 570.)

280. Reading depositions in evidence.— The deposition, taken by any of the various methods, is read in evidence with the same effect, and no other, as the oral testimony of the witness would have, and any objection may be made as if the witness was under personal examination. (§ 911.)

281. Proof of documents.— It is a general principle of the law of evidence that evidence in judicial proceedings must be produced through the testimony, under oath, of competent witnesses. Even in the case of books and papers it is, as a rule, necessary that they should be identified and established by the sworn testimony of some person. A notable exception to this rule exists by authority of statute, in the case of certain papers or records which, when duly authenticated, may be put in evidence without the interposition of personal testimony. Foremost among such papers are:

282. Public documents and records.— These must be proven either through means of *exemplification* or *certification*, depending upon whether they are of some other State of the Union, or of this State.

1. Exemplification. Section 1 of article IV of the Constitution of the United States provides as follows: "Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state. And

the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

The framers of the Constitution very wisely took this subject within the powers of the National Government, and thereby avoided the confusion which would have resulted had it been left to the legislation of the several States.

Pursuant to the Constitution, Congress in 1790 and 1804 passed the legislation here contemplated. It is contained in sections 905 and 906 of the United States Revised Statutes, and whenever it becomes necessary in any of our courts, or in the courts of another State to prove the acts, records, or judicial proceedings of any other State, these provisions must be followed. They are in substance as follows:

1. The acts of the legislature of a State or Territory are authenticated by affixing the seal of such State or Territory to a copy thereof.

2. The record and proceedings of the *courts* of any such State or Territory are proved by the annexation thereto of three certificates. The first of these certificates is by the clerk of the court, under the seal of the court, to the effect that the papers to which the certificates are annexed constitute a true transcript of the original record. The second certificate is made by the presiding justice of the court, whose record is attached, over his hand, to the effect that the person signing the clerk's certificate was in fact the clerk of the court at the time of so doing, that his attestation is in due form, and his signature genuine. The third certificate is again by the clerk, to the effect that the person signing the second certificate was the presiding justice of the court, duly commissioned and qualified, and that his signature thereto is genuine, etc. The third certificate also is attested by the seal of the court.

3. In the case of records not appertaining to judicial proceedings (for instance, the real estate records of a county) the copy is authenticated by the attestation of the keeper of the records under his seal, if he has one. To this is an-

nexed a certificate that the authentication is in due form, and by the proper officer. This last-named certificate is made either by the Governor, Secretary of State, or Chancellor under the great seal of the State, or else by the presiding judge in the county in which the record is kept. If made by the judge, a third certificate must be made as to his authority, signed and sealed by the clerk, in similar form to that used in the case of judicial records, already referred to. These are the *national* regulations. Of course it is not within the power of a State to impose any additional restrictions upon the proof of the records of other States. It is, however, entirely competent for a State to relax these regulations, if it so chooses.

This has been done, in New York, with respect to the statutes of other States or Territories, by section 942 of the Code. Under this, a printed statute-book, purporting or proved to have been published by the authority thereof, or proved to be commonly admitted as evidence of the existing law, in the judicial tribunals thereof, is presumptive evidence of its contents. By the same section the law is declared as to the proof of the unwritten or common law of another State, namely, that it may be proved, as a fact, by oral evidence. And further, that books of reports must also be admitted as presumptive evidence of the unwritten or common law of another State.

Foreign judicial records. The legislation of Congress has no relation to this subject. It is left to State legislation, and the New York rules, which contain similar provisions to those of the exemplification law of Congress, are expressed in Code, §§ 952-956.

Certification.—All public records of this State may be proved by *certified* copies. (Code Civ. Proc., §§ 933, 934.) In this certificate, the person authorized to make it must state, that it has been compared by him with the original, and that it is a correct transcript therefrom, and of the whole of the original. This certificate is attested by the official seal of the officer or county. (Code, §§ 957-959.)

Not only may any public record be proved by certification, but the absence of any record or paper from the files, or from the legal custody of the officer with whom it belongs, may also be proved by official certificate. (§ 921.)

Notary's certificates and protests, with reference to negotiable paper, are, under certain conditions, made evidence under sections 923-925.

Affidavits are entirely inadmissible as proof of facts on the trial of an action. Their use as such is confined to motions. It is permissible, however, to prove publication of legal notices, and in some instances, service of notice, by affidavit. (§§ 926-927.)

A *marriage certificate* or its entry is made presumptive evidence by section 928.

Conveyances. If a conveyance is either acknowledged or proved and certified, so as to entitle it to record in the county where it is offered, it is, by virtue of its acknowledgment, made evidence without further proof. Likewise the record of any such paper or a certified transcript is evidence. It will be noticed in the latter case that the certified copy serves a double purpose, namely, it stands in the place of the original and proves all that the original would, and it also establishes the fact of the record.

A certified copy of any recorded instrument is always available as proof of the fact of record, but the paper itself is not proved by the certified copy unless it fall under the designation of conveyance. (Code, §§ 935-936; *Maxwell v. Inman*, 42 Hun, 265.)

Acknowledgment of papers other than conveyances. Any instrument duly acknowledged, proved, and certified, with the exception of wills and negotiable instruments, is made evidence without further proof. (Code, § 937.)

Records of United States courts and offices are proved, in this State, by certification. (Code, §§ 944-945.)

CHAPTER X.

PROVISIONAL REMEDIES.

283. General considerations.—The ordinary course of litigation runs through summons, pleadings, and trial to judgment. This course, under usual conditions, takes months and often years to accomplish, yet not until the judgment are the rights and objections of the parties settled, and not until after the judgment are the obligations satisfied, or in any way secured.

It is evident that if this ordinary procedure were not supplemented by some incidental instrumentalities, ineffective and unfruitful judgments, would be even commoner than they are.

The law has therefore provided, for use under special conditions, certain anticipatory remedies, which are applied before judgment, and consequently before the rights of the parties are ascertained and determined. Of such character and purpose are the provisional remedies of the Code of Civil Procedure.

They are provisional, or temporary, in character, can be employed only in connection with an action, in which a judgment will ultimately determine the rights of the parties, and have certain features in common; for instance, in all of them the facts necessary to put the remedy in motion must be presented in an affidavit or affidavits, the applicant is required to furnish security in the shape of a bond or undertaking, and a special order or warrant must be made. The provisional remedies, so styled in the Code, are Arrest, Injunction by Order, Attachment, and Receivership. Another remedy of similar character, though not included among the provisional remedies, is that of Replevin.

284. Arrest and bail.— Under old common-law practice actions were commenced and ended by process of imprisonment, and this, regardless of the character of the action. A defendant was arrested and held to bail as the first step in the action against him, and if the subsequent proceedings resulted in a judgment against him, which he failed to pay, he was again put in jail by process of execution, and kept there for an unlimited time. This indiscriminate imprisonment for debt resulted in most odious oppression, but a public opinion against it was of very slow growth, and the iniquitous practice continued, with but small modification, in England and in the United States, until well along in the nineteenth century. The first reforms consisted in limiting the use of civil arrest to tortious actions, and in extending facilities for discharging poor debtors from imprisonment, but in 1886 a more radical reform was accomplished in the enactment that civil arrest under final process for the recovery of money should in no case continue for a longer period than six months, and in proceedings to recover less than \$500, imprisonment should not continue for more than three months. This enactment is contained in section 111, Code Civ. Proc. It has resulted in lessening the importance of civil arrests as an instrumentality of practice. But the remedy, though much restricted, still remains for use in some cases, and the practice employed in its application must be most carefully considered. The arrest, which is the subject of the first title of Chapter VII of the Code, is not arrest under final process, but arrest pending the action.

There are certain actions at law in which an order of arrest against a defendant pending the action, may be made and executed; and also certain actions in equity in which the remedy may be employed. The actions at law are the subject of section 549. Those in equity are the subject of section 550.

285. Right to arrest in actions at law.— Outside of actions to recover fines or penalties, and actions to recover

public money or property wrongfully appropriated, the actions enumerated in the four subdivisions of section 549 may be summed up as including substantially all personal actions of tort; the action upon breach of promise to marry, and two actions upon contract where either the element of fiduciary capacity, or of fraud in incurring the liability, etc., exists. As to all ordinary liabilities on contract the right to arrest has been abolished; and now, as for many years past, the remedy is confined to actions involving fraud or breach of trust, or for injury to person or property.

The actions enumerated in section 449 will be briefly mentioned:

Personal injury, defined in section 3343 as including libel, slander, criminal conversation, seduction, malicious prosecution, perjury, false imprisonment, or other actionable injury to the person either of the plaintiff or of another.

Injury to property, defined in section 3343 as an actionable act whereby the estate of another is lessened other than a personal injury or breach of a contract. A mere action to recover real property does not come within this class, but in an action for an injury to real property or to recover damages for forcible ejectment, etc., an order of arrest may be made. (*Merritt v. Carpenter*, 3 Keyes, 142; *Welch v. Winterburn*, 14 Hun, 518; *Bruce v. Kelly*, 5 Hun, 229.)

Conversion. If an application for an order of arrest be based upon an alleged cause of action in conversion, all of the elements of such a right of action must be present and set forth. (*American Union Tel. Co. v. Middleton*, 80 N. Y. 408; *Tompkins v. Smith*, 62 How. Pr. 499; *affd.*, 89 N. Y. 602.)

Action to recover a chattel. The object of this action (the old name of which is replevin) is to recover possession of a chattel alleged to be wrongfully detained. If in such an action the chattel in question has been purposely concealed, removed, or disposed of, so that it cannot be found, the plaintiff may use an order of arrest. (See *Barnet v. Selling*, 70 N. Y. 492.)

Fiduciary capacity. Under subdivision 2 the right to arrest is conferred in an action to recover for money received, or to recover property or damages for the conversion or misapplication of property where the allegation is made that the property was embezzled or misapplied by the defendant "in a fiduciary capacity." The distinction here to be kept in mind is that between an ordinary contractual relationship, and a relationship in which personal trust and confidence is involved. An agent or attorney, broker or factor, for instance acts in a fiduciary capacity, while in ordinary transactions between dealers or merchants no such element is involved. Presuming the existence and proof of such a fiduciary relationship, the form of the action makes no difference to the right to arrest. (*German Bank v. Edwards*, 53 N. Y. 541; *Baker v. National Exchange Bank*, 100 N. Y. 31; *Collins v. Harris*, 5 St. Rep. 162.)

Fraud in incurring liability. Under the fourth subdivision of section 549 it is provided that in an action *on contract* where the defendant is guilty of fraud in contracting the liability, or has or is about to dispose of his property with intent to defraud creditors, an order of arrest may be employed. In all such cases there must be allegations and proof of facts showing an intent to defraud. The mere fact that a purchaser of goods has knowledge that he is insolvent, and that he omits to disclose his condition to the vendor is insufficient. (*Morris v. Talcott*, 96 N. Y. 100.)

In the case of bankers a stricter rule is established. (*Roeb-ling v. Duncan*, 67 N. Y. 598.)

286. **The right to arrest in equitable actions.**—A judgment in equity differs from a judgment at law, inasmuch as the latter merely adjudicates, while the former not only adjudicates but may also *direct* a party to do or refrain from doing an act. Where such a judgment in equity is sought its efficacy will in large measure depend upon the presence of the party against whom relief is sought, within the jurisdiction.

Under the old practice the writ of *ne exeat* was employed

to keep a party within the jurisdiction. This remedy has been abolished (Code, § 548), and there has been substituted for it an order of arrest under section 550.

The ground of application is that by reason of defendant's nonresidence, or, if a resident, by reason of his impending departure from the State, the judgment would be rendered ineffectual. Its purpose is to obtain some security that the defendant when the time for judgment arrives will keep himself or bring himself within the State in order that process against him to compel the performance of the judgment may be enforced. Of course this remedy is never applicable in an action to recover a sum of money.

Cases, for instance, in which the remedy is appropriate are:

Where the purpose of the judgment sought is to require the defendant to do some act, such as the execution of a deed. (*Brownell v. Akin*, 6 Hun, 378.)

Where specific performance of a contract is asked, and it is reasonably clear will be decreed. (*Brown v. Haff*, 5 Paige, 235.)

And also in actions for divorce and alimony. (*Forrest v. Forrest*, 5 How. 125; *Boucicault v. Boucicault*, 21 Hun, 431.)

287. Restrictions upon right to arrest in case of particular persons.—1. *Women* may only be arrested under civil process in two classes of cases:

1. Under section 550; or

2. In actions to recover damages for *willful* injuries to person or property. (Code, § 553; *Duncan v. Katen*, 6 Hun, 1; *Muser v. Miller*, 12 Abb. N. C. 305.)

2. *Infants* are, as a rule, subject to arrest the same as adult defendants.

An infant under fourteen may, however, be discharged in the court's discretion. (Code, § 554.)

And an infant cannot be made liable upon his contract, by changing the form of action to tort. (*Taylor v. Van*

Keuren, 54 How. Pr. 25; *Radley v. Kennedy*, 37 St. Rep. 612.)

Privileged persons. Individuals exercising some public function or duty are privileged from arrest under civil process.

This privilege is accorded in various special statutes both of the State and of Congress. (Code, § 564.)

For instance: Foreign ministers and representatives; Members of Congress and of the Legislature; Electors on election day; Policemen or militiamen when on duty; Court and legislative officers; Enlisted men of the army; Witnesses and parties in court, or going to or returning from court.

A person may not be enticed within the jurisdiction for the purpose of arresting him under civil process. (*Smith v. Meyers*, 1 T. & C. 665.)

288. Practice in arrest — The affidavit.— To hold an order of arrest strict practice is required. (*Southern Co. v. Sherwin*, 1 Civ. Proc. 44).

And an order is granted only in cases to which the statute is clearly applicable, and never where its propriety depends on a doubtful question of law. (*Cormier v. Hawkins*, 69 N. Y. 188; *Hecht v. Levy*, 20 Hun, 53.)

Where it is intended to employ the remedy of arrest, two or more causes of action should not be joined in the complaint unless the remedy is applicable to all of them. (*Bowen v. True*, 53 N. Y. 640; *Madge v. Puig*, 71 N. Y. 608.)

To obtain an order of arrest it is necessary to present the facts in an affidavit or affidavits, which may be made by any person acquainted with them. Facts should, as a rule, be stated upon the knowledge of the affiant. Where it is impracticable to present a direct and positive statement of a material fact, it may be stated upon information and belief, provided the sources of information are given, with the explanation why the affidavit of the person giving the information is not furnished.

Any technical defect in the affidavit vitiates the proceeding. (*Kuh v. Barnett*, 25 St. Rep. 902; *Saril v. Payne*, 24

St. Rep. 486; *Harris v. Durkee*, 5 Civ. Proc. 376; *Bowen v. Stilwell*, 9 Civ. Proc. 277.)

Ordinarily it is not necessary to present a complaint to obtain an order of arrest. In two of the actions, however, enumerated in section 549, namely, where the demand is against a person in a fiduciary capacity, or where fraud in incurring the liability is claimed, the complaint constitutes one of the papers necessary to be presented. (*Engelhardt v. Benjamin*, 2 App. Div. 91.)

Even in the ordinary case, in which a complaint is not required as one of the papers upon which the order is made, it must, when subsequently drawn, set forth a cause of action in which arrest is a recognized remedy. If it fail in this particular the order must be vacated. (§ 558.)

289. Security.—At the time of making application for an order of arrest the plaintiff must furnish security in the shape of an undertaking, with two sureties, to the effect that, if the defendant recovers judgment, or if it is finally decided that the plaintiff was not entitled to the order, the plaintiff will pay all costs and damages which the defendant may sustain by reason of the arrest. The amount of the undertaking must be at least one-tenth of the bail required, and, in any case, not less than two hundred and fifty dollars. (§ 559.) These provisions are applicable only to cases of ordinary arrest under section 549 and not to the substitute for *ne exeat*. In the latter case the matter of security is left entirely to the discretion of the court. It may be altogether dispensed with, or the form and amount may be prescribed in the order. (§ 560.)

290. The order of arrest.—In case of ordinary arrest the order must be made by a judge. (§ 556.) In case of the substitute for *ne exeat* the order must be a court order. (§ 551.) In either case it may be made at any time after the commencement of the action, or “to accompany the summons.” (§ 558.)

The order must be subscribed by the plaintiff's attorney, and (unless a court order) by the judge. It may be directed

either to the sheriff of a particular county, or generally, to the sheriff of any county. It must require the sheriff forthwith to arrest the defendant, if he is found within his county; to hold him to bail in a specified sum, and to return the order with his proceedings thereunder, as prescribed by law. Rule 13 of the General Rules of Practice prescribes the further requirement that the order shall briefly state the grounds on which it is made.

When the papers upon an application to arrest are handed to the judge, the amount of bail is left blank in the order. The judge fills in the bail required, in view of the probable recovery upon the assumption of the truth of the facts set forth in plaintiff's affidavits.

291. The arrest.—The original order, or, if a court order, a certified copy, and all the original papers upon which the order is made, including the undertaking, must be delivered to the sheriff. When he makes the arrest, he must serve the defendant with copies of all the papers (§ 562); and take the defendant into custody and hold him until discharged by law. (§ 563.)

After the arrest the sheriff is required to file the papers with his return in the clerk's office. (§ 590.)

292. Remedies of defendant arrested.—A defendant in arrest, may at any time before judgment, and in any case within twenty days after the arrest make either, any, or all of three applications, namely:

1. To vacate the order.
 2. To reduce the bail.
 3. To increase the amount of security by the plaintiff.
- (§ 567.)

Such a motion may be based upon the insufficiency of the papers upon which the order of arrest was made, or upon new papers contesting the facts.

If made only upon the original papers, the motion may be made either *ex parte* to the judge who signed the order or upon notice, either to the court, or to the judge who signed the order.

If the motion to vacate be made upon new papers, it must be upon notice to the court or to any judge. In the latter case the plaintiff is permitted to oppose the motion with new affidavits tending to support the ground upon which the arrest was made, and the plaintiff must sustain his right to the arrest upon the original ground. (§§ 567, 568; *Chambers v. Durand*, 33 N. Y. Super. 494; *Cady v. Edwards*, 12 How. 197.)

Conditions. The power given the court to vacate the order *wholly* has been held to include the power to vacate *conditionally*; and where, although upon the entire evidence presented, it appears that there is not sufficient to hold the defendant in arrest, yet that the plaintiff had a good probable case to act upon, and procured his order without malice, it is not uncommon to annex to the order vacating the order of arrest a condition that the defendant shall not bring an action to recover damages for false imprisonment because of the arrest.

The court may not, under this power, however, where the defendant's right to a vacation of the order is absolute, annex any such condition. (*Faulkner v. Morey*, 22 Hun, 379; *Mayer v. Rothschild*, 59 How. 510.)

Supersedeas. A plaintiff using the remedy of arrest is held to the utmost diligence in the prosecution of his action. He must not delay the trial, the entry of judgment, or the issuance of execution. Nor is a plaintiff permitted, if he finds the defendant in jail under the proceedings of another party, to delay the application of his remedy so as to prolong the imprisonment. Section 572 makes provision in detail for all these matters. A defendant so discharged may not be arrested upon a subsequent execution.

293. Bail.—If the defendant does not make a successful application to be released from arrest he must remain in jail, under the order, unless he furnishes security, which he may do through either one of two methods:

1. By giving bail.
2. By depositing with the sheriff the sum named as bail.

A defendant arrested under civil process must be allowed to give bail or make a deposit in lieu thereof, at any hour, and he must be given a reasonable opportunity to seek bail before being committed to jail. (§ 573.)

The form of the bail undertaking depends upon the ground of arrest.

1. If the arrest be made under the substitute for *ne exeat* the undertaking is to the effect that the defendant will obey the direction of the court, or render himself amenable to process to punish him for disobedience.

2. If the arrest be made in an action to recover a chattel the undertaking is to the effect that the defendant will deliver it if delivery be adjudged, and pay the recovery, if any.

3. In any other case the undertaking is to the effect that the defendant will, at all times, render himself amenable to any mandate which may be issued to enforce the judgment. The undertaking must be for the amount named as bail in the order, and must be executed by two or more sufficient bail, stating their places of residence and occupation. (§ 575.) The sheriff can accept only an undertaking in the statutory form. (*Cook v. Freudenthal*, 80 N. Y. 202.)

Sureties; qualifications; justification. Each surety must be a resident of the State and either a householder or freeholder therein, and worth the amount named as bail, exclusive of property exempt from execution.

To make up the required amount more than two sureties may be used. (§ 579.)

There are two distinct steps in making bail effective. The first step is to have the undertaking executed and delivered to the sheriff. This discharges the defendant from custody, but it does not relieve the sheriff from liability to the plaintiff. The law therefore gives him the opportunity to make some inquiry as to the responsibility of the sureties. This is done by an examination under oath "to a reasonable extent" concerning their property and circumstances. (§ 576.)

But after satisfying the sheriff, it remains to give the plaintiff an opportunity to satisfy himself as to the sureties,

to the end that if he do so, or neglect to do so after opportunity, the sheriff's responsibility may be relieved.

Sections 577-581 regulate the practice in justification of bail.

The sheriff is required within three days after bail is given to deliver to the plaintiff's attorney certified copies of the order of arrest, his return thereto, and the bail undertaking.

The plaintiff's attorney, in order to secure a justification, must, within ten days after delivery of such papers to him, serve a notice that he does not accept the bail. If he fail to do this, he is deemed to have accepted the bail, and the sheriff is then relieved from responsibility. If the notice be duly served, the sheriff or the defendant must, within ten days thereafter, serve a notice of justification, before a judge at a specified place and time not less than five nor more than ten days thereafter. At the specified time and place the sureties attend and submit to examination under oath as to their sufficiency. If the judge finds the bail sufficient he annexes their depositions to the undertaking, indorses his allowance, and thereupon the sheriff is exonerated.

Deposit of money in lieu of bail. Cash to the amount named as bail may be deposited with the sheriff, who is required to give receipts and discharge the defendant from arrest. (§§ 582-586.)

In order to prevent sureties on a bail undertaking from neglecting or refusing to justify, and thus disable the sheriff from relieving himself from responsibility, the statute imposes upon them an obligation to submit to examination, and gives the sheriff a right of action against them in the event of their failure to do so. (§ 589.)

Surrender. In contemplation of law, when a prisoner is admitted to bail, he is given into the custody of his sureties, and in any case save in an action to recover a chattel, the bail may surrender the defendant into the custody of the sheriff, and so terminate their obligation. This is done by taking the defendant to the sheriff and requiring the latter

by a written notice to take him into custody. The sheriff then gives a certificate of the surrender to the bail, upon which they get an order discharging them. For the purpose of making such a surrender the bail are given authority to arrest the defendant. (§§ 591-594.)

Remedies against sureties. Sureties upon a bail undertaking have similar rights and remedies as are defined and applied under the ordinary law of suretyship; and their obligation is discharged by neglect to proceed against the principal. (*Toles v. Adee*, 84 N. Y. 222.)

By the express provision of the statute, all remedies against the principal must be exhausted before suing the sureties (§§ 597-599), and the latter are exonerated even after action brought, by the principal's death, discharge, or surrender. (§ 601.)

294. Jail liberties — "Bail to the limits."— Upon the giving of bail of the description already considered the prisoner becomes entitled to his complete liberty, to go where he pleases, subject to his obligation to appear when final judgment is entered against him. He may, however, employ a different method, derived from the common law, by which he may gain a partial liberty.

Each county has a certain territory contiguous to the jail building, designated as the jail limits. In the case of the principal cities the jail limits coincide with the bounds of the city. These limits in the various counties are designated in sections 145-148, Code, and prisoners under civil process may be admitted to these limits, called "the liberties of the jail," upon giving the special undertaking under section 150 *et seq.*

Such an undertaking is required to be in double the amount of bail required and conditioned that the defendant shall remain a prisoner and shall not at any time escape or go beyond the liberties of the jail until discharged from arrest.

The practice concerning the execution of this undertaking

and justification of sureties is similar to that already considered concerning ordinary bail.

After any arrest, under section 549 (including arrest in an action to recover a chattel), a defendant may give an undertaking to the limits instead of the usual bail undertaking. (*Horowitz v. Olenick*, 62 App. Div. 283.)

295. Injunction — General observations.— This remedy is one of the heads of equity jurisdiction, and was formerly administered by writ of injunction issued out of the Court of Chancery. The *form* of the old remedy has been abolished (§ 602) but the Supreme Court still administers relief of the same character, according to equitable principles by means of judgments. Whether an action may be maintained to secure a judgment of injunction depends, as much as it ever did, upon the application of equitable principles which the Code does not touch. The Code provisions concerning injunction have to do only with injunctions *prior* to judgment — “temporary” injunctions, as they are sometimes called. Permanent injunctions are left to the general equity power of the court, and whenever a case is made out upon proper pleadings after a trial, which comes within the equitable rules, the court will render a judgment containing the appropriate injunction; but such an injunction can be obtained only at the end of the litigation. To cover the period between the commencement of the action and judgment, the Code makes provision for a temporary or provisional remedy of the same character and purpose. It is this provisional remedy alone to which the Code title of Injunction applies.

This remedy of temporary injunction may be utilized, first, in actions wherein the complaint seeks a permanent injunction upon sufficient allegations, and it appears further therefrom that the commission or continuance of the act sought to be enjoined during the pendency of the action would produce injury to the plaintiff. (§ 603.) The actions here referred to are of course equitable in their nature. It will be carefully noted that, in such cases, the *complaint* must contain allegations: First, showing the plaintiff en-

titled to final relief by injunction, that is, facts to constitute his cause of action, and second, facts showing the necessity for temporary relief pending the action as well.

But not only may the temporary remedy be invoked in equitable actions of the character indicated, but in all other actions, of whatever character, where one of two things is shown:

1. Either that the defendant is about to procure or suffer to be done an action in violation of the plaintiff's rights, respecting the subject of the action, and tending to render the judgment ineffectual; or

2. That the defendant is about to dispose of his property with intent to defraud the plaintiff. (§ 604.)

It will thus be observed that the equitable remedy of injunction may be temporarily applied in an action at law, where the facts are shown within these requirements.

The object of a temporary injunction is the preservation of rights and the prevention of wrongs pending the action, without finally determining any of the questions involved. The leading principle which courts apply upon applications for temporary injunctions is to impose only such restraint as is shown to be necessary to keep matters in *statu quo*, until a hearing and determination upon the merits. (*Jackson v. Bunnell*, 113 N. Y. 216.)

296. Affidavit to obtain injunction.— To get the temporary order, proofs are necessary, and these, as in every other case of provisional remedy, are required to be contained in affidavits. Here again the simple rule is that the facts shall be stated by those who know them, and that information will be permitted to take the place of knowledge, only where it is shown to be impracticable to get the latter. If the application be made for a temporary injunction in an action the purpose of which is to get a permanent injunction, a complaint must be presented in addition to the affidavit. In other cases, the complaint need not be presented as a necessary preliminary. (§§ 603-604.)

297. The injunction order, in ordinary private litigation, may be either a court or judge's order. It may be made at any time before final judgment after the commencement of the action, or it may even "accompany the summons," that is, may be signed before an action is commenced, this being one of the instances in which a conditional jurisdiction is given, to the extent of authorizing an order. When the order is served, however, the summons must be served with it. The vitality of the order after signature is dependent upon the commencement of the action. (§§ 605-608; *Leffingwell v. Chave*, 19 How. 54.)

Notice of application for an injunction order has to be made if the defendant has answered. If made before answer, notice may be given or dispensed with in the discretion of the court or judge. The usual practice is to give notice of the application through an order to show cause, which itself contains a temporary restraining order. (§ 609.)

The order is required to briefly recite the grounds upon which it is made, and should show on its face all that is necessary to show to the defendant what he is required to do or refrain from. (§ 610; *Lyon v. Botchford*, 25 Hun, 57.)

The method of service depends upon the form of the order. If it be a court order, a certified copy must be served; if a judge's order, service is made by delivery of a copy and exhibition of the original. In either case, copies of the papers upon which the order was made must be served with it. (§ 610; *Koehler v. Farmers & Drovers' Bank*, 14 Civ. Proc. 71.)

298. Security.—In this provisional remedy, as in the others, the party making application for the order must furnish security at the time of making the application. In all, save a few exceptional cases, the character of this undertaking is prescribed in section 620. It must be executed either by the party, or by one or more sureties, as the court or judge directs, to the effect that the plaintiff will pay to the party enjoined such damages, to the amount named in the undertaking, as he may sustain by reason of the injunc-

tion, if it be finally decided that the plaintiff was not entitled thereto.

From the point of view of the person against whom the injunction is obtained, the matter of security is important, for the reason that without it he might suffer an injury and have no legal redress. The bare fact that a person has been injured by the bringing of legal proceedings against him affords no ground of action, unless the prosecution has been malicious and vexatious. Consequently, if no security were given on the obtaining of an injunction order, the party enjoined, if finally successful, would have no remedy for any injury he might have suffered, unless he could show that legal process had been put in motion against him with malicious intent and groundlessly. (*Palmer v. Foley*, 71 N. Y. 106.)

The statute provides for a summary remedy against the sureties on the undertaking, conditioned upon a final determination that the plaintiff was not entitled to the injunction. This remedy consists of a reference upon notice to all parties to ascertain the amount of damages suffered through the injunction. (§ 623; *Pacific Mail SS. Co. v. Toel*, 85 N. Y. 646; *Holcombe v. Rice*, 119 N. Y. 598.)

After the amount of the damage has been thus ascertained the injured party is left to his remedy by an ordinary action, in which any proper defense may be interposed, but in which the amount of damage may not be questioned.

299. Vacating injunction order.— The practice here is similar to that already considered on a motion to vacate an order of arrest. If the original order has been made *ex parte*, a motion to vacate it may also be made *ex parte*, upon the original papers, to the same judge, or such a motion may be made in court either upon the original papers or on contesting proofs. In the latter case the plaintiff may support his original case by new proofs, and the matter is disposed of upon the whole case thus presented. In disposing of such a motion the court may require security from either side as a condition. (§§ 626–629.)

300. **Effect of judgment for defendant upon injunction order.**— Such a judgment dissolves the order, and the court has no power to restore it, pending an appeal. (*Spears v. Matthews*, 66 N. Y. 127.)

301. **Attachment — General considerations.**—The provisional remedies thus far considered, arrest and injunction, are purely *in personam*. Their efficacy depends upon the presence of the defendant within the jurisdiction, and the proceedings are carried into effect by personal service. The remedy of attachment, which is the most important in common use of the provisional remedies, is radically different in its character, which is essentially *in rem*. Its employment depends upon the presence of property of the defendant within the jurisdiction, and its operation consists in the seizure of such property as security for any judgment that may be subsequently recovered in the action against the owner of the property. A remedy of this general character is generally if not universally to be found in the machinery of procedure of every State, but the regulations of the different States differ materially as to the actions in which the remedy may be employed. In some States it is commonly employed in every ordinary action. In others, including New York, its use depends upon special and exceptional circumstances.

302. **Against whom attachment may be used.**—The general principle of the New York statute is that attachment may be used against nonresident defendants (including foreign corporations), and may not be used against residents unless it is proved, in the case of the latter, that the defendant has departed from the State with intent to defraud creditors, or to avoid service, or keeps himself concealed therein with like intent, or has removed property or is about to dispose of property with like intent, or to procure credit has made a false statement in writing as to his financial responsibility. (Subd. 2, § 636.) In other words, unless the defendant be a nonresident, his fraudulent conduct, in some of the specified particulars, must be established by proof.

303. Character of actions in which attachment may be used.—Assuming that the defendant falls within one of the classes in the last paragraph mentioned, attachment may be used in any action at law, to recover damages, whether upon contract or in tort. The use of the remedy was formerly confined to actions on contract, but the statute as now amended includes actions in tort as well. (§ 635.)

304. Papers on application for warrant — The affidavit.—An affidavit or affidavits containing all the facts necessary to authorize the granting of a warrant under the statute, an undertaking, and a warrant, must be prepared by plaintiff's attorney. It is not necessary in attachment, as it is in some cases of arrest and injunction, to present a complaint as one of the papers, although, if a complaint be used, it may with a supporting affidavit serve to sustain a warrant. (*Haebler v. Bernharth*, 115 N. Y. 459.)

The necessary elements of an affidavit to obtain a warrant of attachment are these:

a. Facts showing the existence of a cause of action for damages in plaintiff's favor against defendant, either in contract or tort.

b. If the action be to recover damages for breach of contract, facts showing that plaintiff is entitled to recover a specified sum "over and above all counterclaims" known to the plaintiff.

c. Facts showing either that defendant is a nonresident, or a foreign corporation; or else has evaded service, or concealed himself or disposed of his property with intent to defraud creditors, or made in writing a false statement as to his financial responsibility. (§ 636.)

The courts are disposed to be closely critical in passing upon affidavits upon which a warrant of attachment has been issued, and attorneys for attaching creditors are held to strict technical practice. The remedy is an extreme one. It is substantially the issuing of an execution before judgment, and the rights of the absent defendant should certainly be protected to the extent that the provisions of the Code require. (*Belden v. Wilcox*, 47 Hun, 331.)

The general principles to be followed in drawing an affidavit to obtain attachment are these:

Whenever practicable the person who knows the facts should make the affidavit. Usually this person is the plaintiff, or, it may be, his agent or attorney. If all of the facts cannot be presented upon knowledge, statements upon information and belief may be substituted, provided the necessity be shown, the sources of the information, and the information itself stated, and explanation made why first-hand testimony is not produced. If in such cases the information comes through letters or telegrams, either the originals or copies should be annexed to the affidavit.

The mere averment of a fact upon information and belief, without more, is not sufficient, but the sources of information and grounds of belief must be set forth so that the judicial officer to whom the affidavit is presented may have something upon which he "may be satisfied" that a case is presented for the application of the remedy which is invoked. (*Buell v. Van Camp*, 119 N. Y. 160; *Ladenburg v. Commercial Bank*, 87 Hun, 269.)

In the case where an affidavit is made by a person not obviously connected with the transaction which he narrates, it is important either that his statements be made upon information and belief, disclosing the sources of his information, or else that his means of knowledge be set forth. In the common case, for instance, of an action upon an assigned claim, the assignee, if he makes the affidavit, should take care to comply with this rule, for the reason that the decisions hold that a bare statement, upon knowledge, of an apparent stranger to a transaction will not suffice to uphold an attachment. (*Hoorman v. Climax Cycle Co.*, 9 App. Div. 579; *Tucker v. Goodsell Co.*, 14 App. Div. 89.)

If the action be on contract, the requirement that the affidavit shall show that the plaintiff is entitled to recover a certain sum over and above all counterclaims, is not satisfied by a general averment of damage.

Facts must be set forth which show how the sum named

is that which is due. (*Bloomington v. Cook*, 35 App. Div. 360.)

With reference to the allegation of the nonexistence of counterclaims it is of course generally necessary that the plaintiff should make it, although where a clerk or agent has an intimate acquaintance with the plaintiff's business, he may make this as well as other necessary allegations. This allegation as to counterclaims cannot be omitted without fatal result to the attachment if it be attacked. It may be properly made in an action upon an assigned claim, by the plaintiff assignee. (*Crowns v. Vail*, 51 Hun, 204.)

When we come to the consideration of the requirements of the second subdivision of section 636, the ordinary ground for attachment is the defendant's nonresidence. The fact that a defendant resides in some other place than this State may be simply and briefly stated, but here again, it should be stated by some one with apparent knowledge, or else the details of knowledge should be set forth. (*James v. Signell*, 60 App. Div. 75.)

The rules laid down in decisions upon questions of residence and domicile are difficult to generalize. Residence may come into question concerning the right to vote, or taxation, or liability to attachment, and what would be held to constitute residence for one of these purposes might not be so considered concerning another of them.

A case considering the question of residence connected with the subject of attachment is *Mayor v. Genet*, 4 Hun, 487.

If the application for an attachment is made not upon the ground of nonresidence, but for one of the other causes enumerated in the second subdivision, the construction of the necessary allegation is not so simple a matter. It will be noted that in each of these other cases, one of the necessary elements is fraudulent intent, and a bare allegation that an act is done with fraudulent intent is not sufficient. An intent can only be established by acts indicating it, and such acts must be alleged in order to make the affidavit serve its

purpose. (*Howe Machine Co. v. Pettibone*, 74 N. Y. 68; *Steuben Bank v. Alberger*, 78 N. Y. 252; *Haskell v. Osborn*, 33 App. Div. 127.)

305. The undertaking to procure warrant.—The stipulation of the undertaking must be to the effect that if the defendant recovers judgment, or if the warrant is vacated, the plaintiff will pay all costs which may be awarded to the defendant, and all damages which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking, which must be at least two hundred and fifty dollars. (§ 640.)

The amount fixed has some relation to the value of the property to be attached. As is indicated by the language of the section, the obligation of the sureties is conditioned upon either of two events, viz.: Judgment in defendant's favor, or the vacation of the attachment, so that regardless of the fact whether the attachment be vacated or not, if the defendant finally succeeds in the action, he is entitled to recover upon the undertaking. (*Lee v. Homer*, 37 Hun, 634.)

The fact that the warrant was improperly granted affords no ground of defense to the sureties. (§ 642.)

306. The warrant of attachment.—The formal requisites are prescribed in section 641. It may be directed to the sheriff of a particular county (which is usual), or generally to the sheriff of any county. It must briefly recite the ground of attachment, and require the sheriff to attach and safely keep so much of the property within his county which the defendant has, or which he may have at any time before final judgment, as will satisfy the plaintiff's demand, with costs. The amount of the demand, which must agree with that stated in the affidavit, must also be stated in the warrant. Finally, the warrant must be subscribed by the plaintiff's attorney and by the judge.

307. Service of the summons in attachment actions.—In attachment, as in the other provisional remedies, the remedy may be set in motion, although the action be not commenced by service of process; but its continued vitality depends upon

the subsequent commencement of a regular action and its prosecution to judgment. In the cases of the other provisional remedies, the action is commenced at the same time that the remedy is executed, that is to say, the summons is served on the defendant with the arrest or injunction papers, and as those provisional remedies cannot be utilized at all unless the defendant be reached within the jurisdiction, when they are utilized there is no difficulty in having the action contemporaneously commenced with the execution of the order. As the remedy of attachment is essentially different in its nature from the other provisional remedies, as it is *in rem* and not, as are the others, *in personam*, there are special and peculiar provisions concerning the service of the summons where a warrant of attachment is granted. These provisions, contained in section 638, are to the effect that either personal service of the summons be made within thirty days after the granting of the warrant, or, if such service be impracticable, then within the same period, publication of the summons must be commenced, or service made without the State pursuant to an order of publication.

If personal service be made the action results, if plaintiff be ultimately successful, in a personal judgment against defendant. If service be made by publication, and the defendant fails to appear, the judgment is in its nature *in rem*, and can be enforced only against the attached property. (*Hankinson v. Page*, 12 Civ. Proc. 279.)

A voluntary general appearance by the defendant before the expiration of the thirty days period will obviate the necessity of service of the summons; but, if it be delayed until after that period, it will not save the attachment. (*Blossom v. Estes*, 84 N. Y. 614.)

If, however, publication be commenced, pursuant to an order of publication, within the thirty days limit, a subsequent appearance, during the period of publication, excuses any further compliance with the order. (*Tuller v. Beck*, 108 N. Y. 355.)

308. **Execution of the warrant.**— The warrant may be executed at any time before final judgment, but not afterward. (§ 644; *Lynch v. Crary*, 52 N. Y. 181.)

The sheriff must seize within his county any property of the defendant to which the latter has title, not exempt from execution.

If title to property has been transferred by defendant, the goods cannot be attached. (*Greentree v. Rosenstock*, 61 N. Y. 583.)

Disputes as to the efficacy of an attachment often arise between attaching creditors and an assignee under a general assignment. In such cases, if an assignment be overthrown for fraud or irregularity, an attaching creditor may get a great advantage over ordinary creditors. (*Hess v. Hess*, 117 N. Y. 306; *Rennie v. Bean*, 24 Hun, 123.)

309. **Attachable property.**— As to the nature of property which may be reached by attachment the general principle is that *legal* assets only, as distinguished from *equitable* assets, may be so reached.

For instance, goods in the hands of a consignee, who has made advances thereon, cannot be taken possession of under an attachment against the consignor, for the reason that the consignee, by reason of his advances, has become entitled to the possession; but the consignor retains a legal interest in the goods for the excess of their value over the advances, and this legal interest may be attached. (*Brownell v. Carnley*, 3 Duer, 9.)

On the other hand, the mortgagor of chattels, unlike the mortgagor of realty, by his mortgage transfers the legal title to the chattels. His right to redeem from the mortgage is a purely equitable one and may not be reached by attachment. (*Cutter v. Goad*, 43 Hun, 516.)

Wages due a debtor, for services rendered within sixty days prior to the levy of an attachment, necessary for the support of his family, are not subject to attachment. (*McCullough v. Carragan*, 24 Hun, 157.)

Real property may be attached to the same extent as per-

sonal, namely, legal estates therein and not equitable interests. (*Higgins v. McConnell*, 30 St. Rep. 958.)

Shares in corporations may be attached provided the corporation be domestic. Shares in a foreign corporation are not, except under special circumstances, attachable, for the reason that their *situs* is outside the jurisdiction. (*Plimpton v. Bigelow*, 93 N. Y. 592; *Simpson v. Jersey City Contracting Co.*, 165 N. Y. 193.)

Bonds, or other evidences of indebtedness, are of an essentially different nature from stock, and, when found within the jurisdiction, may be attached, as may also any promissory note or other instrument for the payment of money, under section 648.

Choses in action to which defendant has title may be attached. (See *Nassau Bank v. Yandes*, 44 Hun, 55; *Thurber v. Blanck*, 50 N. Y. 80; *Mechanics & Traders' Bank v. Dakin*, 51 N. Y. 519; *Anthony v. Wood*, 96 N. Y. 180.)

310. *Method of levy.*—A levy under a valid warrant of attachment gives to the attaching creditor a valuable advantage, inasmuch as he thereby gains security up to the value of the property levied upon, to meet any judgment in the action he may secure.

It is therefore a matter of importance that the levy should be properly made, for if not so made, the attachment is inoperative.

The manner in which a levy must be made is prescribed in section 649.

The levy upon real property is a very simple matter. The sheriff is not required to do anything. A notice of the attachment, containing a statement of the amount of the plaintiff's claim, and a description of the real property sought to be affected, is prepared by the plaintiff's attorney, and filed, recorded, and indexed in the clerk's office. This notice has the same effect as a notice of pendency of action; that is, it potentially affects the described property with the result of the judgment in the action.

Levy upon goods and chattels, including bonds and other instruments for the payment of money, is made by taking them into the actual possession of the sheriff. Property of this nature belonging to defendant may be taken either from defendant's possession or from the possession of a third party. In either case the sheriff is required to deliver to the person from whose possession he takes the property, a copy of the warrant and affidavits.

Personal property not capable of manual delivery is levied upon by leaving a certified copy of the warrant, with a notice showing the property attached, with the person holding the same; or, if a demand, with a person against whom it exists, or, if a share in a corporation, with one of its executive officers. In such cases the sheriff is not required in the notice to specify any particular property or debt. A general notice that he attaches all property, debts, etc., belonging or owing to defendant, in the possession or under the control of the person served, is sufficient. (*O'Brien v. Mechanics & Traders' Ins. Co.*, 56 N. Y. 52.)

The usual example of intangible property reached by attachment is furnished in the case of funds held by some person or corporation to the credit of the defendant, although it may consist of an interest in tangible chattels of which some third person has the right of possession as against the defendant. (*Clarke v. Goodridge*, 41 N. Y. 210.)

The bank account of a defendant is attachable as property incapable of manual delivery, the theory being that a bank account is a mere credit in the depositor's favor against the bank. Questions sometimes arise upon the conflict of the claims of attaching creditors, and the holders of checks upon the account. The mere fact that a check has been given does not affect the rights of an attaching creditor, nor will a mere verbal acceptance have any such effect, but the certification of a check in the hands of a *bona fide* holder gives him a claim to the amount certified, which comes in ahead of the attachment. A certification at the request of the maker followed by a retention of the check in his own

hands has no such result. (*Duncan v. Berlin*, 60 N. Y. 151; *Gibson v. Park Bank*, 98 N. Y. 87.)

311. Certificate by third party served with attachment.—It is made the duty of a person or corporation upon whom or which a notice is served, under the third subdivision of section 649, to furnish a certificate to the sheriff showing the nature, amount, and description of the interest of the defendant in any property or debt in the hands of such person or corporation. (§ 650.) This certificate is evidence against the person or corporation making it, but it is open to explanation in case of mistake. (*Almy v. Thurber*, 99 N. Y. 407.)

A person, under this duty, who refuses to perform it may be ordered before a court or judge for examination under section 651.

312. Special provisions for exceptional cases are contained in section 652 *et seq.*, concerning attachments of goods shipped for transportation; in section 656, concerning sale of attached perishable goods; in section 660 *et seq.*, concerning attachment of vessels.

313. Actions in aid of attachment—It is made the duty of the sheriff under section 655, under the direction of the court, to bring necessary actions against third persons to reach property held by them, and also, in cases where the summons has been served by publication, to compel the defendant to discover assets. (See §§ 677-680.)

314. Conflicting claims to attached property.—When, as sometimes happens, property seized under a warrant of attachment is claimed by a third party, the statute provides a proceeding by which a provisional and temporary adjudication is made upon the disputed claims. An inquiry is conducted before a sheriff's jury, the method of proceeding being prescribed in sections 108-109.

If, upon this inquiry, the jury finds the property in the goods to be in the third party claimant, they must be relinquished to the claimant, unless the plaintiff execute an undertaking to the sheriff indemnifying him for the detention thereof.

Provisions are contained in section 658 for the justification of the sureties upon this undertaking. When the justification is complete and the undertaking approved, it operates as a discharge of the sheriff from all liability, and the substitution of the indemnitors in his place to answer for any damages that may be sustained by the claimant.

The finding of the sheriff's jury does not amount to a judicial determination of the question of property in the goods. It is a mere provisional device designed to protect the rights of all parties, however they may ultimately be determined. Practically the sheriff's jury always finds for the claimant, thus putting the necessity upon the plaintiff, if he desires to stand by the prosecution of his attachment, of supporting the sheriff by a bond of indemnity.

315. Vacating or discharging the attachment.—The defendant, or any other person having an interest in the attached property acquired after the attachment (for instance, a subsequent attaching creditor), may, at any time before the application of the attached property to the payment of a judgment, make a motion, either to vacate or modify the warrant, or to increase the security given by the plaintiff, or for any or all of these forms of relief. (§ 682.)

As in the similar proceedings in cases of arrest, the motion may be made either on the ground of insufficiency in the original papers, or upon new proofs. In the former case it may be made either to the court, or to the judge in or out of court who granted the warrant, and with or without notice as may be directed. In the latter case it must always be upon notice, and in such case the plaintiff may fortify his original case by new and additional proofs. (§ 683.)

Where the application to vacate is made upon the original papers, it follows that the defendant's objections must appear with reference to those papers alone, and the matters of fact set forth in the original affidavit, must, for the purposes of the application, be taken to be true, while in the case where the motion to vacate is made upon new papers, it is open to the moving party to attack the facts of the original

affidavit, and if, upon all the papers, the evidence upon any material point preponderates in his favor, he is entitled to an order vacating the attachment.

The motion to vacate may also be made on the ground that the complaint when served does not set forth a cause of action of the kind wherein attachment is permitted, and this motion may be made notwithstanding the denial of a prior application made under section 683. (§ 686.)

Discharge. A defendant is also permitted to secure the release of his property from the attachment by furnishing security in its place. An application for discharge is made by the defendant to the court or to the judge who made the warrant, upon which an undertaking, with sureties, is furnished to the effect that he will pay the amount of any judgment up to plaintiff's demand. An opportunity is given the plaintiff to examine the sureties as to their sufficiency, and after their sufficiency is approved, the property is released from the attachment. (§§ 687-696.)

316. Proceedings after judgment.—Where an attachment has been levied in an action wherein judgment for the plaintiff is subsequently reached, an execution is issued to the same sheriff who levied the attachment. Upon the principles already discussed, if the summons has been otherwise than personally served and there has been no general appearance, the judgment can be enforced only against the attached property. If there has been personal service, or a general appearance, and a resulting personal judgment, if the attached property be insufficient to satisfy it, any other property subject to execution may be levied upon by execution. (§§ 706-708.)

317. Receiverships.—A common instrumentality by means of which courts of equity take possession, control, and management of property which is involved in litigation, is the appointment of a receiver, who, upon his qualification, becomes an officer and agent of the court which appoints him. Courts of equity have such a general power independently of statute. (*Hollenbeck v. Donnell*, 94 N. Y. 342.)

Apart from general equity jurisdiction, the statutes provide for the appointment of receivers incidental to many different special proceedings, as, for instance, proceedings for the dissolution of corporations, and proceedings supplementary to execution.

The provisions of Title IV of the chapter on Provisional Remedies contain nothing of the law of receiverships save a few general directions as to the form of a receiver's bond, and the giving of notice of application for his appointment.

For the purpose of understanding the distinctions of the decisions of the courts it is important to bear in mind the general classification of receivers, namely:

1. Receivers in whom the title to the property involved does not vest.

2. Receivers in whom the title vests.

Ordinary receiverships fall within the first class. A receiver *pendente lite* is a person appointed to take charge of the fund or property to which the receivership extends while the case remains undecided. The receiver acquires no title but only the right of possession as the representative of the court. The title remains in those in whom it was vested when the receiver is appointed, the object of which appointment is to secure the property during the litigation, so that it may be appropriated in accordance with the judgment. (*Keeney v. Home Ins. Co.*, 71 N. Y. at p. 401; *Herring v. N. Y., L. E. & W. R. R. Co.*, 105 N. Y. at p. 371; *Decker v. Gardner*, 124 N. Y. 334.)

The commonest examples of receiverships of this general class in private litigation are in foreclosure suits and in suits between partners.

In foreclosure suits, receivers are appointed upon the plaintiff's application where it is shown to the satisfaction of the court that the security is inadequate, and that the rents of the mortgaged premises will likely be needed to help pay the indebtedness. In actions between partners, the device is frequently adopted of appointing one of the partners as receiver, requiring him to give a bond for the faithful

performance of his duties. A receiver *pendente lite* has no powers except such as are conferred upon him by the court whose officer he is, and he should take no step without obtaining an order of the court directing him.

Receiverships of the class in which title to property vests in the receiver are always specially provided by statute.

The commonest examples are receivers in supplementary proceedings, and in proceedings for corporation dissolution. Their powers and duties depend altogether upon the provisions of the statutes under which they are appointed.

CHAPTER XI.

PROCEEDINGS TO ENFORCE JUDGMENTS.

318. General considerations.—Strictly speaking the proceedings *in* an action end with the judgment, which is the determination of the matters in controversy between the parties. Under the old procedure a judgment in plaintiff's favor in an action at law simply determined that the plaintiff was entitled to recover from the defendant a sum certain, or specific real or personal property, and directed the issuance of an execution to carry it into effect. An equity decree, however, applied personally to the defendant, for it directed *him* to pay, or to do something or refrain from doing something. The element of personal direction or command was the radically distinguishing difference between an equity decree and a judgment at law which simply adjudged without personally directing. Following this distinction, an equity decree was enforced, when its directions were disobeyed, by proceedings to punish for contempt, while such proceedings were unknown in the enforcement of a common-law judgment. The same line of distinction still runs under Code practice, with an important modification, namely, that a judgment for a sum of money whether on the law or equity side of the court is enforceable only by *legal* as distinguished from equitable remedies, namely, by execution and not by proceedings to punish for contempt. (§§ 1240–1241.)

Where, however, a judgment directs payment not by defendant to plaintiff, but by the defendant *into court*, of money (not due upon a contract), proceedings in contempt may be instituted against the disobedient defendant. (*Harris v. Elliott*, 163 N. Y. 269.)

319. Enforcement by contempt proceedings.—A judgment in an equity suit (other than for a sum of money)

when disobeyed is enforced through the special proceeding to punish for contempt of court, provided in sections 2266-2292. As the employment of these proceedings is quite unusual, they are only referred to.

320. Executions.—The recovery of a judgment for money, or for specific real or personal property, gives a legal right to the successful party to employ the executive power of the State to enforce, by means of an execution issued to a sheriff, against the unsuccessful party, the performance of his obligations. The execution is a paper issued and signed by the attorney for the successful party and addressed to the sheriff. It describes the judgment, and directs the sheriff, according to the nature of the judgment, as to what is required of him.

The requirement, in the case of an ordinary money judgment, is to levy upon defendant's property, sell it and, out of the proceeds, pay the judgment, and then to make return of what he has done by an indorsement upon the paper.

An execution following a judgment in ejectment, or a judgment in an action to recover a chattel, contains appropriate directions to put plaintiff in possession of the real or personal property involved in the action.

The ordinary execution against property may be issued to the sheriff of any county in which the judgment is docketed.

Executions following judgments in ejectment or replevin must of course be issued to the sheriff of the county wherein the property is situated. (§§ 1364-1368.)

It is the purpose of the law (following the old theories of the common law) to postpone all remedies against the debtor's real estate until all else fails. To this end, the direction in the execution is required to be to the effect that the sheriff shall satisfy the judgment out of the personal property of the judgment debtor, and if sufficient cannot be found, then out of the real property belonging to him at the time when the judgment was docketed or at any time thereafter. (§ 1369.) If interest on the judgment is to be collected under the execution, the latter must contain explicit direction to that end. (§ 1368; *Todd v. Blatchford*, 86 N. Y. 517.)

321. General duties of sheriff on receipt of execution.—His first duty is to indorse the day, hour, and minute of its receipt. (§ 1363.) This provision is important, where more than one execution is issued against the same defendant, so that it may be known which comes first.

The delivery of a valid execution to the sheriff imposes upon him the responsibility of reasonable obedience to its directions. If there be within his county any property of the judgment debtor liable to execution, he is held to reasonable diligence in seeking it and levying upon it, and whatever he does, or fails to do, he is bound to make his return within sixty days from its receipt. He is not bound to wait this sixty days if, after reasonable effort, he fails to find property, but may sooner make the return of nothing found.

322. Execution after attachment.—Following the principles discussed under the law of attachment, section 1370 directs that if the summons in an attachment case has been served by any method other than personal service, unless there has been a voluntary appearance, the execution shall run only against attached property — personal, first, and real, last.

If the summons has been personally served or the defendant has appeared in the action, the execution runs; 1st against attached personal property; 2d, against unattached personal property; 3d, against attached real property; 4th, against unattached real property.

It is important in an attachment case, to draw the execution strictly according to those provisions. (*Place v. Riley*, 98 N. Y. 1.)

323. Execution against representative.—A person against whom judgment is entered in a representative capacity, such as an executor, trustee, assignee, and the like, is not personally responsible. Hence his own property is not subject to execution, but only that of the person whom he represents. (§ 1371.) The practice on issuing an execution against an executor or administrator in his representative capacity is regulated by sections 1825–1826.

324. Time within which execution may be issued.—The general rule is that it may, as a matter of course, be issued at any time within five years after the entry of judgment. (§ 1375.) This right survives to the personal representatives of a deceased creditor up to the expiration of the same period. (§ 1376.)

After the expiration of five years the right still continues subject to these qualifications:

1. That an execution was issued within the five-year period, and returned wholly or partly unsatisfied; or

2. Application must be made to the court for an order granting leave, upon proof that the judgment is unsatisfied, and upon notice. (§§ 1377–1378.)

325. Execution against decedent's property.—In order to comprehend the elaborate and involved provisions of section 1380, it is necessary briefly to consider the policy of the law with reference to the appropriation of a debtor's property to pay his debts. Under ordinary circumstances this policy is not to divide a debtor's property *pro rata* among his creditors, but to permit that creditor who succeeds, through legal proceedings, in first laying hold of the debtor's property, to satisfy his claim in preference to, and even in exclusion of, all others.

This rule is merely that of the common law, expressed in the maxim: "*Qui prior est tempore potior est jure.*" (He who is first in time is strongest in right.)

The rule in equity is at variance with this principle. Wherever a debtor's assets are brought into a court of equity the maxim of "Equality is equity" is applied. Consequently in all manner of insolvent proceedings, through bankruptcy, insolvent assignments, and the like, which are equitable in their nature, the assets are distributed *pro rata*, and not according to the common-law rule. The estates of decedents in like manner are administered upon equitable as distinguished from legal principles. When a man dies all legal proceedings against his property are suspended until it is ascertained what are the claims against his estate. If these

amount to more than his property, the equitable rule is applied and the proceeds distributed *pro rata*. Now a word concerning the effect of debt upon the debtor's real property. The rule here is that an ordinary debt imposes no lien upon real estate, nor does a mere judgment have any such effect. The *docket* of a judgment imposes such a lien which continues for ten years against all real estate owned by the debtor at the time of the docket or thereafter within ten years acquired by him.

When a man dies, however, the statute imposes a lien upon all real estate whereof he dies seized, in favor of all his creditors, whether their claims be put in judgment or not. This lien continues for three years after the granting of letters testamentary or of administration upon his estate, so that the persons who succeed to the title, either by descent or devise, take subject to this statutory lien and cannot alien the property divested of the lien. (§ 2749 *et seq.*)

The provisions of section 1380, and the following are drawn to preserve the rights of creditors having judgment liens, and those having the statutory lien alone, and require proceedings in the Surrogate's Court upon notice to all interested creditors before an execution is satisfied.

326. Exempt property.—The general policy of the law is that a person shall be required to pay his obligations, and that when an obligation takes the form of a judgment, his property shall be taken from him to make satisfaction, but, to a limited extent, the law recognizes the superiority of the claims of family to those of creditors, and exempts from execution certain articles of property. These exemptions are provided for in sections 1389–1404.

The general scheme of exemption is that implements of livelihood and necessary household furniture shall be exempt, and, in the application of the law, the term “necessary” is given a very liberal interpretation.

There are, however, two classes of actions to which the exemption statutes do not apply:

1. Where the recovery is for work done by a domestic servant.

2. Where the judgment is for the price of exempt articles. (§ 1391.)

Military rewards, arms, uniforms, etc., are exempt under section 1393; and

Burial grounds, under sections 1395 and 1396.

The Homestead Exemption Act of 1850 with some amendment is incorporated in sections 1396-1404. The land and buildings exempted must be used as a family homestead, worth not more than one thousand dollars, and a notice containing a description thereof must be recorded in the county clerk's office. The application of the homestead exemption law is practically confined to the rural districts.

327. Personal property bound.—Excepting exempted property, all of the personal property of a judgment debtor is bound from the time of the delivery of an execution to the sheriff, and not before. (§ 1405.) The effect of this rule is that after the delivery of an execution the judgment debtor may not transfer any of his goods or chattels so as to free them from the creditor's execution. A *bona fide* purchaser without notice is, however, protected by the provision contained in section 1409. (*Williams v. Shelly*, 37 N. Y. 375.)

328. The levy under an execution.—There are three stages to the operations under an execution; 1st, the delivery; 2d, the levy; 3d, the sale; and while the mere delivery affects the debtor's goods, a levy within the life of the execution must be made, or the goods will be freed. (*Hathaway v. Howell*, 54 N. Y. 97.)

The sheriff under an execution must observe the obligations of his duties to both parties. He is required to make a levy upon sufficient property to satisfy the judgment, but must not levy upon too much.

The levy is made by taking the goods under the sheriff's dominion and control.

The usual method is for the sheriff to take the goods into his actual custody, and either remove them to his storehouse

or leave his keeper in charge; but it was held a sufficient levy to bind the sheriff when he went to the debtor's store, informed him that he levied upon his goods, made a memorandum, and left the debtor in possession. (*Wehle v. Conner*, 83 N. Y. 231.)

A levy can only be made upon the tangible personal property of the debtor. Anything in the nature of credits cannot be seized.

Special provision is made for levying upon money, bonds, pledged property, and partnership property. (§§ 1410-1417.)

329. Claim by third party to goods levied upon.—As in the case of attachment, it is sometimes necessary to make a provisional determination upon the question of property in goods, where, under an execution, the sheriff seizes goods as those of the debtor and a claim of property therein is made by a third party; and the method provided in section 1418 *et seq.* is similar to that already noted in connection with attachment.

Under these sections, if a third party claims the goods, the sheriff may refer the question of property to his jury. If the jury finds against the claimant, he is still at liberty to pursue any legal remedy, notwithstanding the verdict, and may either replevy or sue for damages; but the levy holds. (§ 1420.)

If the jury, however, finds for the claimant, the sheriff must surrender the property levied upon to him, unless the judgment creditor still insists that he retain it and backs him up with an indemnity bond. When the undertaking provided in the statute is given the sheriff must retain the goods as though they were those of the judgment debtor, and so dispose of them. In such case, if the sheriff be afterward subjected to a suit by the third party, he may procure the substitution of the indemnitors as defendants in his place. (§ 1421 *et seq.*; *Hein v. Davidson*, 96 N. Y. 175; *Hayes v. Davidson*, 98 N. Y. 19.)

330. Sale under execution.—The regulations concerning sale of property under an execution and the effect of the sale are few and simple where personal property is the subject of sale, and quite the contrary where real property is sold.

Personal property. The sale, which must be by public auction, and in the usual hours of business, must be advertised by posting notice in three conspicuous places in the town or city wherein the sale is to be made. The goods must be offered in lots, so as to bring the best price attainable, and must be on view at the sale. A purchaser gets immediate possession and title. (§§ 1384, 1428, 1429.)

Real property. If it be necessary to sell real property under an execution, the proceedings are essentially different from those prescribed in the sale of chattels.

The law, still following the principles of the common law, only deprives a judgment debtor of his real estate, as a last resort, and, as we shall see, the debtor's title is not finally extinguished until he has had an extended opportunity to save it.

It is first necessary to consider what estates in real property may be sold under execution. The general principle is that legal estates only (as distinguished from equitable) are subject to execution; and the methods prescribed for selling real estate are extended to the sale of chattels real, provided the term has an unexpired period of at least five years. (§ 1430.) A leasehold interest having a smaller unexpired term is sold as chattel and not as real property.

The interest of a *cestui que trust* in real estate cannot be sold under an execution, where the trust is a valid one. Section 1431 concerns invalid trusts in which the law vests the legal estate in the beneficiary.

In order to understand sections 1432 and 1433, it is necessary to have some acquaintance with the remedies which the owner of a mortgage has for the recovery of the debt. This remedy is twofold. He can sue at law in an action upon the bond, and recover a money judgment, or, in equity, to foreclose the equity of redemption in the mortgage

premises, or he may get both remedies in one action, procuring an equity judgment of foreclosure and a money judgment for any deficiency. The purpose of the provision of sections 1432 and 1433 is to prevent the mortgaged property from being taken in satisfaction by any other means than through a regular foreclosure.

With these exceptions any legal estate alienable by the judgment debtor may be sold under an execution. For a discussion of the law upon what interests in real property may or may not be sold, see *Sheridan v. House*, 4 Keyes, 569.

We have seen that in the proceedings under an execution against personal property a levy is an essential, but it is not so with reference to real property. The mere issuance of the execution gives the sheriff authority to sell the judgment debtor's real estate in his county, without any other preliminary than the giving of the statutory notice.

All that the sheriff can sell is the interest which the debtor had in the lands at the time of the docket of the judgment, and a purchaser takes only such title as the debtor then had, subject to the burdens then in existence. This principle leads to the result that an unrecorded conveyance takes precedence of a judgment creditor's lien on the property conveyed. (*Trenton Bank v. Duncan*, 86 N. Y. 221.)

A sheriff's *deed*, however, following an execution sale, under the recording act, takes precedence over a prior unrecorded conveyance. (*Hetzell v. Barber*, 69 N. Y. 1.)

A purchaser at an execution sale of real property gets no greater right than the judgment creditor would have gotten if he had purchased. (*Clute v. Emmerich*, 99 N. Y. 342; *Frost v. Yonkers Savings Bank*, 70 N. Y. 553; *Stilwell v. Carpenter*, 59 N. Y. 414.)

Notice of sale containing a description of the property to be sold must be posted forty-two days before the sale, and published once a week for the six weeks immediately preceding the sale. (§§ 1434, 1435.)

Only sufficient property to satisfy the judgment must be

sold, and to this end, where the property is divisible into lots or parcels, they must be separately sold. (§ 1437.)

Certificate of sale. At the conclusion of the sale a deed is not given to the purchaser, but merely a certificate, nor can the deed be given for upwards of a year afterward. During the interval between the sale and the deed an opportunity is given to all interested parties to redeem the property and clear it from the judgment and execution.

Immediately after the sale the sheriff is required to make and execute a certificate in duplicate, containing the names of the purchasers, descriptions of the property sold to each, and the prices bid. One of these certificates is filed and indexed in the county clerk's office, and the other delivered to the purchaser, or one to each purchaser, if there be more than one. (§§ 1438, 1439.) The certificate does not operate to divest the title of the debtor and vest it in the purchaser. It merely gives the latter the right to the subsequent conveyance to him by the sheriff, after the period of redemption has expired, but upon the expiration of that period without redemption having been made, the purchaser's title is deemed to relate back to the time of sale. (§ 1440.) In any case if the purchaser's title is attacked by the judgment debtor or any one claiming under him, a judgment against the purchaser's title will be unavailing unless repayment be made to him for the amount originally paid, with interest and costs.

During the redemption period, that is between the sheriff's certificate and his deed, the judgment debtor remains in possession and enjoyment of the property, although he cannot exercise complete dominion. His rights and liabilities are defined in section 1441 *et seq.*

Redemption. A redemption from the sale may be made at any time within a year thereafter by the judgment debtor or by his heir, devisee, or grantee. This provision of the statute has been held to permit the debtor himself to redeem within the time limited, whether he has meanwhile parted with his title or not. If he has parted with his title, the

right to redeem is coexistent in him and in his grantee. (*Livingston v. Arnoux*, 56 N. Y. 507.)

To accomplish a redemption by the debtor himself or by any one standing in his shoes, payment must be made to the purchaser, or to the sheriff for him, of the amount paid at the sale with interest at the rate of ten per cent. per annum. (§ 1446 *et seq.*)

Upon such a redemption the sale and certificate become null and void.

After the year within which a debtor may redeem has expired, there is a further period of three months within which any creditor having a lien, either by mortgage or judgment, upon the property sold may redeem; and, to that end, must pay the amount paid at the sale with seven per cent. interest, and must also satisfy the mortgage or the judgment under which the prior redeeming creditor has his lien. And every creditor having a lien is entitled, in turn, to redeem if he chooses, by paying superior liens and reimbursing prior redeeming creditors. (§§ 1449-1468.)

Upon redemption either by the judgment debtor or a lienor, it becomes the duty of the sheriff to make, execute, and acknowledge a certificate embracing all the facts of the redemption.

At the expiration of the redemption period the sheriff must execute a deed to the person entitled, unless the redemption has been made by the judgment debtor or person holding the legal title, in which case no deed is necessary, for the reason that the title remains where it was unaffected by the sale. If no redemption has been made the holder of the certificate is entitled to a deed.

331. Execution against the person.— In a limited class of cases the judgment creditor may seize the body of the debtor in satisfaction of his judgment.

The right to this remedy depends upon the nature of the action. The test is whether the plaintiff had the right to an order of arrest as a provisional remedy. If he had, he also has the right to final process against the person, and the

right to execution exists regardless of the issuance of an order of arrest, except that where the right to arrest depends upon facts extrinsic to the cause of action, an order must have been issued and held; otherwise a body execution may not in such case be used. (§ 1487; *Elwood v. Gardner*, 45 N. Y. 349.)

This execution requires the sheriff to arrest the judgment debtor and commit him to the county jail, until he pays the judgment or is discharged according to law. (§ 1372.) An execution of this sort can only be issued against a woman, following an executed order of arrest. (§ 1488.) As a general rule, an execution against the person can be issued only after the return of an execution against property, wholly or partly unsatisfied. If the judgment debtor is already in custody under other civil process, the execution against property is not a necessary preliminary. (§ 1489.)

At common law, the taking and holding of the debtor's person under a *capias ad satisfaciendum* operated as a satisfaction so long as the debtor was held in jail, and if a creditor took that course he was held to it, and a consent by him to discharge his debtor ended his legal remedies. Under the Code, while the idea that the body execution suspends other remedies is retained, yet provision is made that after thirty days' imprisonment of the debtor, the creditor may consent to a discharge and revive his right to a property execution. (§ 1494; *Flack v. State*, 95 N. Y. 461.)

Supplementary Proceedings.

332. The general nature of these remedies.—At common law a creditor's remedies ended with the execution; under which, as we have seen, only legal title to real estate in the debtor, and his tangible personal property could be reached. Anything in the nature of credits or incorporeal rights, of which in modern society so large a proportion of property consists, cannot be reached by execution. It has taxed legal ingenuity to provide means for reaching property enjoyed or controlled by a debtor, and compel its application to the payment of his debts, where the property is so situated as to title,

or is of such character as to render ordinary legal remedies of no utility.

The earliest extraordinary method employed, when ordinary means failed, was a creditor's suit in equity, of which some mention will be made later. Apart from this remedy, a statutory special proceeding has been constructed, the purpose of which is to furnish a creditor with the means of investigating fully as to the debtor's property and property rights, and within certain limits providing summary methods to reach and apply discovered property.

333. Conditions precedent to the remedy.— 1. A judgment for at least twenty-five dollars must have been entered against the judgment debtor, following personal or substituted service of the summons, or the personal appearance of the defendant in the action.

2. An execution upon the judgment must have been issued to the sheriff of the county of the debtor's residence or place of business, or, in case of a nonresident debtor, to the sheriff of the county in which the judgment-roll is filed.

Ordinarily these proceedings are not available against corporations which are judgment debtors, for the reason that other remedies are provided with respect to corporations, but where such other remedies are not applicable, as for instance in the case of a foreign corporation having no agent and doing no business in this State, it has been held that supplementary proceedings may be used. (*Logan v. McCall Pub. Co.*, 140 N. Y. 447.)

After the death of a judgment debtor, these proceedings are not available, as his assets are administered in the Surrogate's Court for the general benefit of creditors.

334. The three remedies in supplementary proceedings.— They are: 1. An order for the examination of the judgment debtor, after the return of an execution against his property unsatisfied.

2. An order for similar examination, after the issue, and before the return of an execution, in aid of the execution.

3. An order for the examination of a third party re-

specting property in his hands belonging to the judgment debtor.

The third remedy may be pursued either independently or in association with either of the two others. (§ 2432.)

335. Examination of debtor after execution returned.—This remedy may be prosecuted at any time within ten years after the return of an execution against property, wholly or partly unsatisfied. Before a creditor is entitled to this order he must have exhausted his remedy at law, and he has not reached this point until the return, unsatisfied, of the execution. After the return, which may be before, as well as at, the expiration of sixty days, the right to the supplementary order is complete.

It will be noted that the judgment creditor is entitled to this order for his debtor's examination as a matter of course, without showing anything but the mere facts of the recovery of the judgment, the issuance to the proper sheriff of the execution, and its return unsatisfied. He does not have to show the existence of property which ought to be applied in payment of the judgment. In fact the common purpose of this order is to enable the creditor to find out whether or not such property exists.

336. Examination in aid of execution not returned.—This remedy, which is of unusual application, is to discover and apply property through the execution. In addition to the formal facts, the applicant must present proofs showing particular property subject to execution withheld by the debtor which should be applied.

337. Third party order.—This order may be made either before or after the return of an issued execution, directing the third party to appear for examination as to the debtor's property. It is necessary, in addition to the formal facts, to show in the affidavit upon which this order is made that the third person has property of the judgment debtor exceeding ten dollars in value, or is indebted to the judgment debtor in an amount exceeding that sum. The purpose of the proceeding is first to ascertain the facts as to the debtor's prop-

erty in the third party's hands, or as to the indebtedness from the latter. Its ultimate purpose is to have the property or credit in the third party's hands applied toward the judgment, but this ultimate purpose can only be directly served in cases where the third party raises no question against the claim that the property sought to be applied is that of the judgment debtor. If there be any adverse claim by the third party it cannot be disposed of in these proceedings. The proper method to pursue where the third party raises such a question is to have a receiver appointed in the supplementary proceeding, who may after his qualification as the representative of the judgment creditor bring a regular action against the third party. (*Merrill v. Allin*, 46 Hun, 623; *Crounse v. Whipple*, 34 How. Pr. 333; *Teller v. Randall*, 40 Barb. 242.)

338. Institution of proceedings.—Upon presentation of the necessary facts required for the particular proceeding sought to be instituted, set forth in an affidavit, an order is made by a judge of the court which made the judgment, or in special instances by a judge of another court; for instance, where the recovery is in the Municipal Court of the city of New York, the order is made by a judge of the City Court. (§ 2434 *et seq.*)

A collateral remedy, rarely employed, is provided whereby pending the regular proceedings a debtor may be arrested by warrant. (§§ 2437–2440.)

The order must be made returnable in the county of the debtor's residence or business. (§§ 2435, 2436, 2441; *Anway v. David*, 9 Hun, 296.)

It may be made returnable either before a judge or designated referee. (§ 2442.)

Service must be made upon the person to be examined by delivering copies of the affidavit and order and exhibiting the original order. Service on a corporation is made by delivery to an officer. (§ 2452.)

Service may be made at any time before the return of the

order. Irregularities in service are waived by appearance unless preliminary objection be raised.

339. Injunction accompanying, or included within order.—The order for examination usually contains an injunction against the party served, prohibiting him from making or suffering any transfer or other disposition of or interference with the property of the judgment debtor or the property concerning which the examination is to be had, until further direction. (§ 2451.)

The facts required to be shown by affidavit in order to obtain the examination order suffice also to sustain the injunction. If an injunction be not included in the examination order, it may be made the subject of an independent order upon similar proofs, and in such case is similarly served. (§ 2451 *et seq.*)

340. Examination under the order.—As has been remarked, the order may require the examination of the party named before a judge or a referee. Whether a referee shall be named depends upon the discretion of the judge who makes the order. If a referee be appointed it is important that he take the statutory oath before commencing performance of his duties. (§ 2445.) Technical defects vitiate the proceedings. (*Browning v. Marvin*, 5 Abb. N. C. 285.)

The scope of the proceeding is not confined merely to an examination of the party against whom the order is obtained. The purpose is to discover whether or not there is any property which ought to be applied in payment of the judgment, and both the moving and the responding parties to the proceeding may examine witnesses to sustain their respective contentions, and after the institution of the proceedings the attendance of witnesses is secured by subpoena. (*People v. Warner*, 20 St. Rep. 573.)

In the conduct of the inquiry, the creditor is not confined to close limits. The requirement of the statute is that the "debtor shall attend and be examined concerning his property." The creditor is entitled to a full discovery, and may inquire into all transfers made by the debtor, and ferret

out concealments and transactions by which property has been held or disposed of. (*Lathrop v. Clapp*, 40 N. Y. 328.)

A party or a witness in supplementary proceedings is not excused from answering a question on the ground that his answer will incriminate him, but his testimony cannot be used against him in a criminal proceeding. (§ 2460; *Barber v. People*, 17 Hun, 366; *Loomis v. People*, 19 Hun, 601.)

The depositions in supplementary proceedings are usually written out in long hand and signed by the witnesses; but, if the parties so stipulate, they may be taken by a stenographer and signature waived. In such case the stipulation should be made a part of the record.

341. Disobedience of orders, or refusal to testify.—

If a person neglects or refuses to attend in obedience to the order for his examination, or disobeys the injunction, or refuses to answer proper questions, he lays himself open to punishment for contempt. In case of an act of contempt before a referee he should specially report the facts to the court, as he has no power to institute proceedings to punish for contempt. (§ 2457; *Miller v. Adams*, 52 N. Y. 409.)

The contempt may consist of disobedience to the injunction order forbidding the transfer of property pending the proceedings. In order to establish a violation of such order it must be shown that the property disposed of was acquired *prior* to the service of the order, and that it was in its nature not exempt. (*Potter v. Low*, 16 How. Pr. 549; *Hancock v. Sears*, 93 N. Y. 79.)

Of course, if the original order to appear for examination has been made without authority or jurisdiction, disobedience is not contempt. (*Kennedy v. Weed*, 10 Abb. Pr. 62.)

342. Referee's report of examination.—If, pursuant to the order, the examination has been had before a referee, he must make his report thereof. If he has been appointed simply to take testimony he must report all the evidence and proceedings before him. If the order directs him to report

the facts, in addition to the testimony, he reports his findings of fact. (§§ 2442-2443; Rule 30, General Rules.)

The reference is not to hear and determine, but simply to assist the judge, and the report is therefore not conclusive.

343. Orders to deliver property or pay money.—The subject thus far considered concerns the inquiry and investigation into the debtor's affairs, by the compulsory examination of himself and witnesses.

The machinery provided in these proceedings to enable the creditor to realize something in satisfaction, in whole or in part, of his judgment is now to be considered.

1. When the testimony taken in the proceeding discloses the fact that the debtor has in his possession, or under his control, property subject to levy and sale under an execution, the judge has authority to make an order directing the debtor to pay over the money or deliver the property to the sheriff, or to a receiver.

2. Likewise where property capable of manual delivery, belonging to the debtor, in the hands of a third person who does not dispute the debtor's right is disclosed, such third person may be ordered to deliver up the property. (§ 2447.) The kind of property subject to this compulsory order is that capable of delivery, and as to the right to the debtor's possession of which there is no substantial dispute. Should the debtor have some property *right*, however valuable, against another, the remedy of compulsory order is inapplicable. Such property can be reached either through the permissive order or the receivership hereafter considered. So, also, if a third party claims the right either of title or possession to property which the creditor seeks to have applied to his judgment, the compulsory order is inapplicable. In such case the creditor must pursue his remedy through a receiver. (*West Side Bank v. Pugsley*, 47 N. Y. 368.)

344. Permissive orders, provided by section 2446, supply another means for reaching the debtor's property. Such an order may be made at any time after the commencement of the proceedings and before the appointment of a receiver,

permitting any one indebted to the judgment debtor to pay the sheriff, on account of the judgment, any sum not exceeding the amount necessary to satisfy the execution. Of course such an order is useless unless the person to whom it is directed is willing to comply with it, for there is nothing compulsory about it. If he chooses to obey it, and pays over the money, it operates, to the extent of the payment, as a discharge of his indebtedness to the judgment debtor, unless the latter has transferred his right to another person, in good faith, and for a valuable consideration, whereof notice has been given.

345. Receivers in supplementary proceedings.—A further and more indirect method, for employment in the attempt at realizing something to satisfy the creditor's claim, is furnished through the appointment of a receiver, authorized in section 2464. By this means the title in the property of the debtor is, by operation of law, taken out of him and vested in the receiver. The receiver thus gets title to whatever the debtor had title to, including all rights to bring suit (not of strictly personal nature) which the debtor had before the appointment.

This order may be made by the judge making the order instituting the proceedings, at any time after their commencement, although it is not usual, in practice, to ask for a receiver until the completion of the examination. It is almost a matter of course to appoint such a receiver at the close of the examination, if the creditor asks it, although if it appear that there is absolutely nothing to receive, there is no good reason why a receiver should be appointed. If any possible property or property right is disclosed on the examination, a receiver will be appointed. Provision as to notice of the application is made in sections 2464-2465. The order should provide the terms of the bond to be given by the receiver, upon the filing of which the appointment becomes complete. If it be intended to affect real property, either the order or a certified copy should be filed in every

county in which such real property is situated, and also in the county of the debtor's residence.

When the appointment is completed and perfected, all the personal property of the judgment debtor which he had *at the time of the commencement of the proceedings*, vests in the receiver. (§ 2469; *First Nat. Bank. v. Martin*, 49 Hun, 571.)

Briefly stated, the effect of this device of having the receiver's title relate back to the time of his appointment amounts to this: If, at the time of the commencement of the proceedings, the debtor has any sort of personal property — either money or a chattel, or a right capable of assignment, and he either gives it away, or pays it away to any one having notice of the proceedings, the gift or payment does not serve to transfer the title, which, notwithstanding the purposes and acts of the debtor, will vest in the receiver; but this provision is limited so as not to affect the title of a purchaser in good faith, without notice, or the payment of a debt in good faith and without notice.

Only one receiver in supplementary proceedings may be appointed. If other or subsequent proceedings are instituted by other creditors the receivership is extended on their application. (§ 2466.)

346. Property which may be reached in supplementary proceedings.— The general principle is that *any* property or property right which is transferable by the owner may be reached. This includes all goods, chattels, and credits and legal interests in real property.

The articles of property which the law permits a debtor to keep for himself as against his creditors, such as household equipment, wearing apparel, and sixty days' wages may not be reached. (§ 2463; *Cummings v. Timberman*, 49 How. Pr. 236; *Hancock v. Sears*, 93 N. Y. 79.)

Trust property may not be reached; neither may rights of action for personal wrongs, as such rights are not transferable.

The interest of a *cestui que trust* in a trust created for his

benefit, to the extent of the excess of the amount required for his reasonable support, although it may not be reached in supplementary proceedings, may be in a creditor's suit in equity. (*Williams v. Thorn*, 70 N. Y. 270; *Tolles v. Wood*, 99 N. Y. 616.)

347. Subsequent examinations.— It may be that the judgment debtor has been fully examined in supplementary proceedings without discovering any property. In such case, the creditor may subsequently desire to try it again. He may do so; but rather as matter of favor than of right, and to get a subsequent order he must produce proof of further facts than those required for the first order. A judgment creditor is not permitted to harass his debtor by successive examinations in supplementary proceedings. He is entitled to examine the debtor, as fully as may be, *once*. After that, it is no longer a matter of right, but of judicial discretion. (*Canavan v. McAndrew*, 20 Hun, 46.)

When an application is made for a second or subsequent order the applicant is required to submit proofs, not only of all the matters which the statute requires, but also of after-acquired property of the debtor. In other words, the affidavit to obtain the first order is not required to say anything about the debtor's property. He may have none, and yet the creditor has the right to compel him to submit to examination. The right to a second or subsequent examination, however, is dependent upon some proof by the creditor of after-acquired property of the debtor, and if he submits no such proof, his subsequent order will be vacated. (*Irwin v. Chambers*, 40 N. Y. Super. 432.)

Nor will a mere formal, general allegation of after-acquired property suffice to uphold a subsequent order. There must be a specific, definite allegation of particular property. In *Rallings v. Pitman*, 49 N. Y. Super. 307, the affidavit upon which it was sought to sustain a subsequent order contained this paragraph: "That since last examination the defendant hath become possessed of certain personal property;" upon which the court commented: "It does not state what

the property referred to is; whether it remains in possession of the defendant, or whether it may be applied to the payment of the judgment. Nor does it state anything that would make an examination into the existence of such facts proper or useful for the plaintiff. What is said must be true of any judgment debtor who has been examined under any circumstances, within a very brief time after the examination."

A second proceeding should not be commenced until the first be terminated. (*Brockway v. Brien*, 37 How. Pr. 270; *Keihen v. Shipherd*, 16 Civ. Proc. 183.)

348. Judgment creditor's action.— This is defined in the Code as an action brought by the judgment creditor to aid the collection of a judgment for a sum of money or directing the payment of a sum of money. (§ 3343, subd. 14.)

There are a few general provisions concerning this action in sections 1871–1879 which for the most part follow the principles already in existence. A judgment creditor's action, in the name of a creditor's bill, is an old head of equity jurisdiction. A creditor's bill could be filed when it was made to appear that the creditor could not reach the property of his debtor by proceedings at law. Such a suit might be brought to discover assets; to reach equitable or other interests, not subject to execution, and to set aside fraudulent conveyances or obstructions. (3 Pomeroy's Eq. Proc., § 1415.)

Actions by a judgment creditor are now usually of one of two kinds; either where the allegation is that the debtor has equitable assets which cannot be reached by execution; or where the allegation is that the debtor possesses property in its nature subject to execution but burdened with fraudulent incumbrances. Equitable assets not subject to execution are for instance: Wages of the debtor, *Kingman v. Frank*, 33 Hun, 471; rights of action, *Hudson v. Plets*, 11 Paige, 180; Share of debtor in an estate, *McArthur v. Hoysradt*, 11 Paige, 495; *Hallett v. Thompson*, 5 Paige, 583; a vendee's

interest in land not yet conveyed to him, *Decker v. Decker*, 108 N. Y. 128.

The interest of a *cestui que trust* in the trust property may not be thus reached; but in the income therefrom, so far as the same exceeds reasonable support and maintenance, it may be. (*Williams v. Thorn*, 70 N. Y. 270; *Tolles v. Wood*, 99 N. Y. 616.)

Equitable assets also include all property which in its nature is subject to execution, but which has been transferred or conveyed by the debtor with intent to hinder, delay, or defraud creditors and to prevent them from procuring the application of the property to payment of the judgment. (*Dewey v. Moyer*, 72 N. Y. 70; *Gould v. Maheady*, 38 Hun, 294.)

The theory of the action is that it may not be resorted to until a creditor's remedies at law have been exhausted. As its name indicates, it can only be brought by a judgment creditor; that is, a creditor who has recovered a judgment upon his claim, and his judgment must have been followed by an execution which must have been returned wholly or partly unsatisfied. It follows that the complaint should set forth the recovery of the judgment at law, and the ineffectual proceedings for its collection.

If property is discovered which ought to be applied toward the payment of the debt the judgment directs that it shall be, whether the property be subject to execution or not. (§ 1873.)

The remedies of injunction and receivership are very commonly employed in this action, and are expressly mentioned in sections 1876 and 1877, and a very complete power to compel discovery is given in section 1878.

349. Independent jurisdiction in equity to reach property of the debtor continues in existence, and it is therefore possible to maintain an action of this general character without reference to the statutory regulations. (*Patchen v. Rofkar*, 12 App. Div. 475.)

CHAPTER XII.

PARTICULAR ACTIONS, WITH SPECIAL REGULATIONS.—1. ACTIONS CONCERNING REAL PROPERTY.

350. General considerations.—Certain classes of actions are made the subject of special provisions of the statute. Of these actions some are common, and others rare and unusual. Of the former a general view will be given, while the latter merely will be mentioned.

The principal actions relating to real property for which the Code makes special provisions are foreclosure, partition, ejectment, dower, waste, and to compel determination of a claim. There are some general provisions applicable to all, which will be first mentioned.

Lis pendens. In any action brought to recover a judgment to affect a title to, or possession or enjoyment of, real property, the plaintiff may, when he files his complaint, or at any time afterward before final judgment, file in the county clerk's office of the county in which the property is situated, a notice of the pendency of the action, sometimes called the notice of *lis pendens*. The purpose of this paper is to charge every one with notice of the existence of the action and its purposes. Section 1670 specifies the required details of the notice, viz.: the names of the parties, the object of the action, and a brief description of the property affected. In order to make the notice effectual it is necessary to file the complaint with it, and thereafter, within sixty days, to make service of the summons.

The very useful purpose of a *lis pendens* is indicated by the legal effect which is given to it through the operation of section 1671, viz.: it is made constructive notice from the time of its filing to a purchaser or incumbrancer of the property affected thereby, from and against the defendants with

respect to whom the notice is directed to be indexed. A person whose conveyance or incumbrance is subsequently executed or acquired is bound by all proceedings taken in the action to the same extent *as if he were a party to the action*. The recording and indexing of the notice is provided for in section 1672.

Where a counterclaim affects real property, a defendant may use the *lis pendens* against the plaintiff. (§ 1673.)

The *lis pendens* remains alive and effective until canceled. Power to order its cancellation upon proper proofs is given the court.

Judicial sales of real property in partition, foreclosure, or dower actions:

1. On all such sales, the officer making them is required to pay out of the proceeds, all taxes, assessments, and water rates which are liens on the property sold. (§ 1676.)

2. Where a judgment affects real estate in several different counties, a certified copy of it should be filed in each of such counties. (§ 1677.)

3. Such a sale must be at public auction, whereof notice must be given in the same manner as of a sheriff's sale, unless the property to be sold is situated in a city in which a daily paper is published, in which case notice of sale must be published twice a week for three successive weeks immediately preceding the sale. In New York city such publication must be made in two newspapers.

The terms of sale must be made known at the time of sale, and if the sale is to be made subject to any incumbrance that fact must be announced. Lots must be sold separately, unless otherwise expressly ordered. Sales must be made between noon and three o'clock, P. M. (§ 1678; Rule 62.)

Any judicial sale may be set aside by the court under whose direction it is made, for any fraud or irregularity. A purchaser at a judicial sale acquires peculiar rights and subjects himself to peculiar obligations. By buying the property, he submits himself to the jurisdiction of the court in the action as to all matters connected with the sale relating to

him in the character of purchaser. He consequently may be compelled, by a motion in the same action, to complete his purchase, and, on the other hand, he may upon motion be relieved of his purchase and have his deposit and expenses refunded to him. Such a purchaser has a right, not only to a good, but to a marketable title, and if the examination of title discloses any question which makes the title doubtful, the purchaser will not be compelled to complete.

Action of Foreclosure.

351. Parties.—The holder of the mortgage, whether the original mortgagee, or his successor in interest, is made plaintiff.

The owner of the equity of redemption, his wife, and all lienors upon his interest, holding liens subsequent to the mortgage under foreclosure, are necessary parties defendant. In addition to these any person responsible for the debt represented by the bond may be made defendant.

The necessary information as to subsequent liens, etc., is obtained through official searches made and certified in the register's and county clerk's offices. Title company searches may be properly employed for the same purpose.

The searches should be brought down to include the date of filing the complaint and *lis pendens*, so as to make certain that every person who should be made a party is brought in.

352. The complaint.—The usual action of foreclosure has a twofold object: 1, to foreclose the rights of the defendants in the mortgaged property, and have its proceeds applied to the payment of the debt; 2, to recover a judgment at law for any deficiency. It is the policy of the statute to encourage the joining in one action of these two remedies. (§§ 1628–1630.)

The complaint is required to contain simply a statement of the terms of the mortgage, its record, a careful description of the property covered by it, a statement of the default in payment, an allegation that the defendants other than the mortgagor have, or claim to have, some interest in or lien

upon the mortgaged premises accruing subsequent to that of the plaintiff, and the statement, required by section 1629, whether any other action has been brought to recover any part of the mortgage debt, and, if so, whether any part has been collected. Then follows the prayer for both equitable and legal relief, namely, for the foreclosure of the equity of redemption of the mortgagor, and all persons claiming under him, for the sale of the mortgaged premises, and satisfaction out of the proceeds of the mortgage debt, interest and costs, and for a personal judgment against the parties liable for the amount of any deficiency.

353. Commencement of the proceedings.— The summons and complaint having been drawn, and also a notice of *lis pendens*, which in this particular action is not only permitted, but commanded (§ 1631), these papers are filed in the county clerk's office. Then the summons is served as in any other action. If all the defendants are residents and under no disability, the proceedings are much simplified, but if there are any absentees among them, they must be served by publication, this being one of the cases in which service by that method is most commonly employed. The notice of object of action (§ 423) is usually served with the summons upon those defendants who are merely subsequent incumbrancers. If there be infant parties, guardians *ad litem* must be appointed as in any other action.

If a defense is interposed by answer, the action is brought on to trial and judgment the same as any other equity action; but if, as is generally the case, there be a default the practice is peculiar.

354. Proceedings in case of default in pleading.—All of the defendants having been brought in, either by service or voluntary appearance, and the time to plead of all of them having expired, the plaintiff's attorney prepares an affidavit, usually called the "affidavit of regularity," which he makes himself. This affidavit is described in Rule 60 which contains substantially the same requirements as the old chancery rule on the same subject. This affidavit contains a statement

of the proceedings already taken; whether any of the defendants are infants or absentees; what amount is due; the default in pleading of all the parties and the filing of the *lis pendens*.

With this affidavit, together with all the proofs of service and appearances, an application is made at Special Term, upon notice to all appearing attorneys, for an order of reference to compute. By this order, a referee is appointed whose duty it is to compute the amount due on the bond and mortgage. Proceedings to prove the amount due are then had before the referee, who thereupon makes a brief report, upon which judgment of foreclosure and sale is applied for at Special Term. If there be an infant defendant, or if any of the defendants has been served by publication the order of reference is somewhat wider in its provisions. It must contain, in addition to the direction to compute the amount due, a direction "to take proof of the facts and circumstances stated in the complaint, and to examine the plaintiff or his agent, on oath, as to any payments which have been made." (Rule 60, § 1216.) In such a reference the referee should annex the testimony to his report.

355. Judgment.—The judgment *must* direct a sale of the mortgaged property or of such part thereof as is sufficient to discharge the debt, with interest and costs. (§ 1626.)

A *strict* foreclosure (*i. e.*, one barring the defendant and confirming the plaintiff in title to the property) cannot, therefore, be had, save in the case where in a regular foreclosure some right to redeem has been, by error, left unaffected. Such an outstanding right may be cut off in an action for strict foreclosure. (*Bolles v. Duff*, 43 N. Y. 469.)

The judgment names a referee to conduct the sale, and he advertises and superintends the sale in the manner prescribed generally for judicial sales already considered.

After an interval for the examination of the title, the referee executes a deed to the purchaser, or, if he has assigned his bid, to his assignee.

The legal effect of this deed is defined in section 1632, viz.: that it "vests in the purchaser the same estate, only, that would have vested in the mortgagee, if the equity of redemption had been foreclosed. Such a conveyance is as valid, as if it was executed by the mortgagor and mortgagee and is an entire bar against each of them, and against each party to the action who was *duly summoned*, and every person claiming from, through, or under a party, by title accruing after the filing of the notice of the pendency of the action."

In other words, the same estate passes which the mortgagor could have conveyed by deed at the time of giving the mortgage.

It follows that the purchaser gets no greater or freer title than the mortgagor had when the mortgage was given; consequently, that any prior lien, or any rights paramount to the mortgage are not affected.

It follows also that the rights of any subsequent lienor not made a party are not affected. (See *Howell v. Leavitt*, 95 N. Y. 617; *Slattery v. Schwannecke*, 118 N. Y. 543; *Weeks v. Tomes*, 16 Hun, 349.)

356. Proceedings subsequent to the sale.— After the completion of the purchase under the sale, the referee makes and files his report of sale, so as to make the advertisement, its proof, and the proceedings at the sale matters of record. An order of confirmation may thereupon be entered.

A sale under foreclosure rarely realizes *exactly* sufficient to pay off the debt, interest, taxes, and costs. Generally there is more, or less, than sufficient to balance the account. In the former case there is a surplus — in the latter a deficiency.

Deficiency. Where there is a deficiency the clerk docketts judgment for its amount as shown in the referee's report against such defendants as the judgment holds liable for it. No new application to the court is necessary to enter this judgment. (§ 1627.)

Note, that in order to enter a deficiency judgment, the defendants to be held must either have been personally

served, or have appeared. (*Schwinger v. Hickok*, 53 N. Y. 280.)

The persons against whom a deficiency judgment may be rendered are:

1. The original mortgagor, provided he covenanted, either in the bond or mortgage to pay the debt; or his legal representatives.

2. Any subsequent grantee of the mortgaged premises, who, either by an independent agreement, or by a recital in his deed, assumes the payment of the mortgage debt; or his legal representatives. (*Thomas on Mortgages*, chap. XX.)

Surplus. If after the payment of the mortgage, costs, liens, etc., a surplus remains, section 1633 requires that it be paid into court, for the use of the persons entitled thereto, and Rule 61 requires such payment to be made within five days after its amount is ascertainable, in New York to the city chamberlain; in all other counties, to the county treasurer.

Rule 64 prescribes the practice in proceedings for distribution of the surplus. Any person having a lien upon the mortgaged premises at the time of the sale, is entitled to procure a reference to ascertain and report the amounts due lienors and their respective priorities. All interested parties are given notice of the proceedings before the referee, to enable them to present and prove their claims, and oppose conflicting claims. All legal and equitable questions concerning the right to participate in the surplus may be litigated upon this reference. (*Bergen v. Carman*, 79 N. Y. 146; *Thomas on Mortgages*, chap. XXXI.)

Action for Partition.

357. Preliminary considerations.—Either by voluntary acts, or the operation of law, the title to real property is sometimes vested in a number of persons, who hold it either as joint tenants (rarely), or as tenants in common (usually).

If a conveyance be made of a piece of land, to two or more grantees, they each hold an undivided interest in the whole.

If a man devise land to a number of devisees in common they each have a like interest; and if a man die intestate, seized of real estate, the title descends to his heirs-at-law according to their respective rights and interests, and they hold it as tenants in common.

If all the persons having joint or common interests in a piece of land are *sui juris* (that is, under no legal disability, such as infancy or lunacy) they may partition among themselves the property, by means of mutual deeds, so that there shall be set apart to each some particular part of the land to be held by him in severalty; or they may all join in a sale of the land, and divide the proceeds, so that each shall get what belongs to him.

But it may be that such an arrangement cannot be carried through by consent. It may be impracticable to come to an agreement upon the plan or details of division, or one or more of the parties jointly interested may be legally disqualified from consenting, by reason of his infancy or other disability. The law provides proceedings, through the instrumentality of a partition suit, to accomplish the same result; viz., either an actual division, or a sale and division of proceeds.

The general framework of an action of partition was provided in the old Revised Statutes, the provisions of which are, for the most part, re-enacted, with additions and amendments in sections 1532-1595.

It is the careful purpose of these provisions to protect the rights of all parties having any interest, immediate or remote, in the premises or their proceeds.

358. Who may bring the action.— Any of the joint tenants or tenants in common may bring the action, but the plaintiff must have actual or constructive possession of the land, in common with the other parties.

The owner of a life estate in an undivided part of real property may maintain an action of partition, although if he have a life estate in the whole he may not, for the reason

that in the latter case there is nothing in the way of his enjoyment of his estate.

It follows that a tenant by the curtesy in an undivided interest may bring partition, while one having curtesy in the whole may not.

Even in the latter case, however, if an action be brought, and no question raised of the plaintiff's right to sue, the judgment will hold. It has been held in such a case that the court having jurisdiction of subject-matter and parties, a judgment will be held good, and a purchaser thereunder held to his purchase. (*Reed v. Reed*, 107 N. Y. 545.)

The general test of a party's right to bring partition is his right to immediate possession of an undivided interest, in property partly owned by others, whether the respective holdings be under the same title, or adverse titles. (*Weston v. Stoddard*, 137 N. Y. 119.)

A party holding a contingent or future right only may not bring partition, save in two excepted cases, viz.: 1. Remaindermen or reversioners may bring partition among themselves, subject to the rights of the owners of the particular estate, and there can, of course, in such an action, be no sale ordered unless the latter consent. (§ 1533.)

2. An heir, whether in or out of possession, may bring partition in the face of a devise which he alleges and establishes to be void. (§ 1537.)

359. Infant parties.—An infant may not bring partition unless authority be first obtained from the surrogate of the county in which the property is situated, upon evidence that the interests of the infant will be promoted by bringing the action. The court in which the partition action is brought must likewise be satisfied that the interests of the infant will be served, before ordering partition or sale. (§ 1534.)

In actions for partition, as in all others, an infant party, whether plaintiff or defendant, must be represented by a guardian *ad litem*, but there are some particulars of practice respecting the guardian's appointment which differ in a partition action. In other actions the guardian may be ap-

pointed by the court or by a judge. In this one, by the court alone. (§ 1535.)

In other actions, no security is necessary, except where money or property is to be received for the infant by the guardian, and then it is given in the shape of a bond to the infant (§ 475), while every guardian *ad litem* in partition must execute and file with the clerk, before he enters upon his duties, a bond to The People of the State, conditioned for the faithful discharge of the trust committed to him. (§ 1536.)

350. Parties defendant.—An exhaustive enumeration of the classes of persons which must be brought in as defendants is made in section 1538. There must be included every person having an undivided share, in possession or otherwise, in the property, as tenant in fee, for life, by^{*} curtesy, or for years; every person having any future estate or interest, vested or contingent, in undivided shares; every person having an estate in dower either inchoate or complete. Elaborate provisions are contained in this section, of which a word of explanation will be useful. When a person dies owning real estate, and leaving creditors, a statutory lien is imposed for the period of three years after the grant of letters, upon his real estate, in favor of creditors, which they can enforce, if his personal estate prove insufficient to satisfy their claims. The purpose of the special provisions in section 1538 is, in case of the death of a person having an interest in the land whereof partition is sought, leaving creditors, to cut off their statutory lien by making them parties and paying their claims out of the proceeds.

A tenant of the *whole* property, either for life or for years, and any person having a lien upon the *whole* property *may* be made a party. If they are not, the judgment cannot affect their interests, and the partition or sale (whichever takes place) is made subject to their rights. If they are made parties, the court is given power in section 1539, to award to them the value of their rights, or to leave their

interests unaffected. It may be said that the usual practice is to bring in the parties indicated in this section.

Lienors upon undivided interests *may* also be made parties. (§ 1540.)

If there be an actual partition, the liens of such creditors attach to the parcels set apart to their respective debtors. It is the usual practice to make parties such lienors.

Where persons who have or may have an interest in the property to be partitioned are unknown, or where their names are wholly or partly unknown, and service is made upon them by publication, the notice required to be annexed when the summons is so served must, in addition to its usual contents, state briefly the object of the action and contain a brief description of the property. (§ 1541.)

Cases upon parties in partition actions. (*Nellis v. Nellis*, 99 N. Y. 505; *Moore v. Appleby*, 108 N. Y. 237; *Jordan v. Poillon*, 77 N. Y. 518.)

361. The complaint, in partition, is required to state the common source of title, describe the property with common certainty, and specify the rights, shares, and interests of all the parties. (§ 1542.) Rule 65 also requires that all real estate in the State owned in common by the parties shall be brought into the scope of the action.

362. The answer.—Under section 1543 the question of title may be litigated either between the plaintiff and defendants, or any of them, or among the defendants as between themselves. In the latter case answers should be served between defendants. (§ 521.)

363. The trial.—Where an issue of fact is raised in a partition suit, it is triable by jury, and such a trial is usually had upon questions framed by the court. If no questions be so framed, the issues are tried directly upon the pleadings. (§ 1544.)

364. Practice in case of default.—This is prescribed in section 1545 and Rule 66. Under these provisions, if a party is in default, or where a party is an infant and the title is not in question, the plaintiff makes an application, upon

affidavit and notice, to the Special Term, for an order of reference to take proof of title, and of the matters set forth in the complaint, and to ascertain and report the rights and interests of the several parties. It is also usual in this order to refer the question whether actual partition be practicable and just.

365. **The interlocutory judgment.**—The questions of title and practicability of partition having either been tried, or disposed of by the reference, an interlocutory judgment is entered, which declares the rights and interests of each party, in the premises affected by the suit. If actual partition be practicable and just, the interlocutory judgment directs it to be made. If impracticable or burdensome, the interlocutory judgment directs a sale. From this point the proceedings differ radically, depending upon which course be adopted, whether division or sale. If actual partition be adjudged it remains to carry it out, through the means hereafter mentioned; while if a sale is directed, entirely different proceedings are required.

The practice in case actual partition cannot be made will first be considered. Here it is obvious that the rights of creditors may be involved. If a creditor has a lien against an undivided interest, and the property be actually partitioned, it is quite apparent that his rights will not be interfered with, for whatever lien he has against the undivided interest will apply to the apportioned interest. But, on the other hand, if the property is to be sold under a judicial sale, either the land will be gone and the creditor's rights with it, or the purchaser will not get a free title; unless some measures be taken to ascertain liens and provide for their payment out of the proceeds. For this purpose sections 1561–1565 make provision.

It is made the duty of the court to ascertain, before making an interlocutory judgment directing a sale, whether there be any lienors not parties. This inquiry may be satisfied either through official searches and affidavits, or through a reference for that purpose. This question is usually referred

to the referee to take proofs on title, by a clause in the order appointing him. He advertises and takes proofs and reports upon this subject as required in section 1562.

Creditor's claims are protected by provisions that the shares in the proceeds subject to liens shall be paid into court, and they can be withdrawn only after opportunity to the lienors to realize their claims. (§§ 1563-1565.)

These subordinate proceedings will not, however, delay distribution of shares upon which there are no liens. (§ 1566.)

Still considering the practice in the event of a sale, it is in such case necessary also to provide for dower rights and life interests, if any such there be, in undivided portions of the property.

If the dower right attaches to the whole property, and the sale is directed free from dower, the holder of the right is entitled to have the value of her estate invested for her benefit for life, or its present value ascertained and paid, and directions to this effect should be contained in the interlocutory judgment. (§ 1568.) Similar methods are provided with respect to dower in undivided interests. (§ 1569.)

With respect to inchoate rights of dower, and all other future rights, vested or contingent, the court is required to ascertain their respective values, and direct their investment or payment over. (§ 1570.)

In the case of inchoate dower the wife may execute a release which dispenses with the necessity of any further provision concerning it. (§ 1571.)

Special provisions are made also for protecting the rights of unknown persons in the proceeds (§§ 1572, 1582); concerning sales partly on credit (§§ 1573-1575); and investments for infants, life tenants, etc. (§ 1581 *et seq.*)

366. The sale is advertised and conducted in the mode already considered with respect to judicial sales. A report of sale is required to be made under oath by the officer conducting it, containing a statement of the proceedings, with descriptions of parcels sold, names of purchasers and prices. (§ 1576.)

367. Final judgment.— The report of sale being filed, the next step is the drawing and entering of the final judgment. This paper should contain a recital of all the proceedings following and pursuant to the interlocutory judgment. It should then confirm the report of sale, direct the execution of conveyances pursuant thereto, and provide for the distribution of the proceeds so that each party having a present right therein shall receive his share, and each party having a future or contingent right shall have it protected in accordance with the principles already discussed.

This judgment is conclusive upon all parties to the action who have been served with the summons, or have appeared.

It is also conclusive upon all persons claiming under any party to the action, by title accruing after the filing of the *lis pendens*, or after the judgment, if no *lis pendens* has been filed. It is also conclusive against any person not in being at the time of entry of the interlocutory judgment, who, by the happening of any contingency, becomes afterward entitled to a beneficial interest attaching to, or an estate or interest in a portion of the property, the person first entitled to which, or other virtual representative whereof was a party. (§§ 1557, 1577.) In order, however, to bind such future rights the judgment must provide for the maintenance of a fund to which they may attach upon coming into being. (*Monarque v. Monarque*, 80 N. Y. 320.)

The judgment also concludes creditors, whether parties or not, provided they have had the opportunity to establish their claims under the practice already mentioned. (§ 1578.)

368. Actual partition.— We will now revert to the practice from and after interlocutory judgment, in case that actual partition is thereby awarded. In this case the interlocutory judgment appoints three commissioners to make the partition (§ 1549); who must qualify by taking an oath required in section 1550.

If, upon consideration, the commissioners conclude actual partition to be impracticable (notwithstanding the inter-

locutory judgment) they make that report to the court, which may thereupon order a sale. (§ 1551.)

But, if practicable, the commissioners proceed to set apart, in separate parcels, plots of land, each of which, in relation to the whole property, is about equal in value to the respective interest of each party entitled, as defined in the interlocutory judgment. For this purpose they may employ surveyors. (§ 1552.)

The commissioners set forth the details of partition, with full descriptions of property and interests, in a report, on the filing of which a motion is made for judgment. Unless the court differs from the conclusions of the commissioners, it confirms the report in a final judgment which makes the partition firm and effectual.

This judgment is binding and conclusive in like manner as that following a sale. (§§ 1557-1558.)

Absolute accuracy in division is seldom attainable in cases of actual partition. For differences in value the court is authorized to award compensation to be paid by one party to another, with some restrictions. (§ 1587.)

369. Proceeding by guardian or committee for leave to agree to partition.—At the commencement of the subject of partition we mentioned that parties, if *sui juris*, may make partition among themselves. An infant or lunatic cannot so consent, but sections 1590-1593 provide a special proceeding by which leave to consent to partition is obtained for such a disqualified person. This proceeding may sometimes be employed instead of an action.

Action of Ejectment.

370. Preliminary considerations.—At common law the use of the ancient real actions for the purpose of determining title to property was practically superseded by that of ejectment, which, although originally merely a personal action to recover damages for an ouster, yet, by the employment of fictions, was utilized to determine questions of title.

Laying aside the fictions employed at common law, the old

New York Revised Statutes, following the principles of the common-law action, provided, under the same designation of ejectment, proceedings of the same nature.

The older statutes have been superseded by sections 1496-1531 of the Code of Civil Procedure, which are a re-enactment with incidental amendment. The name of the action is changed from ejectment to "an action to recover real property," although the old name is still employed by lawyers and judges. It is practically a real action which tests not only the right to possession, but the title upon which the right is based, whether in fee, or for life, or for years. Except as modified by the special provisions of the Code, the action is conducted in the same manner as any other civil action at law. The action will lie only for corporeal hereditaments; only for tangible real property of which possession may be delivered by the sheriff to the plaintiff. (*Woodhull v. Rosenthal*, 61 N. Y. 382.)

It is brought by a person out of possession, upon a claim of superior title, and the right to immediate possession based thereon. One claiming a future right of title has no standing to bring the action. (*Judge v. N. Y. C. & H. R. R. Co.*, 29 St. Rep. 475; *Trull v. Granger*, 8 N. Y. 115.)

It is another principle of this action that the plaintiff can recover only upon the strength of his own title, and not merely upon the weakness of defendant's title. If the plaintiff have no superior right, it is unimportant by what right the defendant is in possession. (*Roberts v. Baumgarten*, 110 N. Y. 380; *Wallace v. Swinton*, 64 N. Y. 188.)

In some instances it is the policy of the Code, where it provides a particular method of legal relief, to exclude the employment of other methods. Thus, in section 1498 a mortgagee, and in section 1499 a dower claimant, each is prohibited from maintaining ejectment; it being designed that such claimants shall employ the actions of foreclosure and dower, to obtain relief.

In ejectment, incidental damages as well as possession may be recovered. (§§ 1496, 1497).

The statute law prohibits traffic in ejectment suits or in titles not coupled with possession (Penal Code, §§ 129, 130); but even in such cases the offender may prosecute a civil action in ejectment under his grantor's name. (§ 1501; *Smith v. Long*, 12 Abb. N. C. 113; *Chamberlain v. Taylor*, 92 N. Y. 348; and 105 N. Y. 185.)

371. Parties defendant.—The only necessary party defendant, if the property is actually occupied, is the occupant. If it is not actually occupied, it must be brought against some person exercising acts of ownership thereupon, or claiming title thereto, or an interest therein at the time of the commencement of the action. (§ 1502.)

It is, of course, proper, if the actual occupant does not himself claim title, also to add as parties defendant those who do make such claim, but the only effect of not joining them is to leave all questions open to future controversy in an action by or against them. (§ 1503; *Bradt v. Church*, 110 N. Y. 537.)

372. The pleadings.—The complaint should allege facts showing plaintiff's right; the character of his estate; the description of the property; the wrongful withholding of possession, and grounds, if any, for damages. (§ 1511.)

There are no special requirements as to the defendant's pleading. He may of course demur if the complaint be defective, or he may set up any facts which show him either legally or equitably entitled to retain possession.

373. Peculiar incidents.—This action has incidental practice peculiar to itself, for instance:

1. A defendant may require plaintiff's attorney to show his authority. (§§ 1512–1514.)

2. The court may direct the action to be divided into two or more actions. (§§ 1516–1518.)

3. The verdict, report, or decision must specify plaintiff's estate, and the property to be recovered. (§ 1519.)

4. Special provisions are made in case of death of defendant. (§§ 1521–1523.)

5. A final judgment is made conclusive upon all the parties

as to the title established thereby, upon each party and every person claiming under him by title after the judgment, or after the filing of a *lis pendens*. (§ 1524.) This provision makes the use of a *lis pendens* at the commencement of the action practically necessary.

6. There is an altogether exceptional provision in actions for ejectment as to new trials. In such actions, at any time within three years after judgment, the person against whom the judgment was rendered, or his successor in interest, may obtain a new trial for the asking, as a matter of right and without even claiming error, provided he pay the costs and damages awarded by the judgment; but if a plaintiff is put in possession under the first judgment he retains it unless ousted as a result of the second trial. After the granting of a first new trial, a subsequent new trial may be ordered for cause. (§§ 1525-1526.)

7. Rents and profits, for six years only, may be recovered in the judgment, and damages must be reduced by the value of permanent improvements made by the defendant in good faith. (§ 1531.)

Action to Compel the Determination of A Claim to Real Property.

374. This is the reverse of an action of ejectment. It is a statutory device by which a person in possession for one year or more of real property, under a claim of title in fee, for life, or for ten years or more, may bring action against an outsider who asserts an adverse claim. It may not be brought against a person under a disability.

The complaint is required to contain the facts above indicated, to describe the property with the same accuracy as is required in ejectment, and to demand judgment barring the claim therein of the defendant.

The answer may deny plaintiff's possession, or may assert an adverse claim and demand. Where an issue of fact is joined the subsequent proceedings are as in ejectment.

The judgment is conclusive in like manner as a foreclosure

judgment against the defendant and every person claiming under him by title accruing after the filing of the judgment-roll, or the notice of *lis pendens*, but, where the defendant sets up an adverse title in his answer and thereupon proceedings are taken as in ejectment, the rule as to new trials in the latter-named action is applied to this. (§§ 1638-1650.)

Action for Dower.

375. Provisions regulating this action are contained in sections 1596-1625. The proceedings are quite similar to those prescribed for partition, and it is unnecessary to go over them in great detail.

Except in cases of personal disability, a widow must bring an action for dower within twenty years of the death of her husband.

The action may also be brought by the widow's assignee or her receiver. (*Payne v. Becker*, 87 N. Y. 153.)

In this action as in ejectment the only necessary party defendant is the occupant of the premises in which dower is claimed, although any person claiming title or right to possession may be joined.

Damages for withholding may also be claimed, to the extent of one-third of the *mesne* profits for six years prior to the action, where the action affects property of which the husband died seized, or of the same proportion of the profits from the time of the commencement of the action, where the action affects property conveyed by the husband in his lifetime.

The interlocutory judgment is similar to that in partition. It adjudges the plaintiff's rights, describes the property affected thereby, and directs admeasurement of dower by the referee, or three disinterested freeholders, who take the official oath, and proceed, if practicable, to set aside a particular parcel or parcels for occupancy by the widow for her life. If they succeed in setting apart a particular tract for her actual occupancy, final judgment is entered as in partition.

If it be impracticable to set apart a particular tract for occupancy, or in any case if the widow prefer to have her rights reduced to cash value, such sum as it is ascertained her rights are worth is paid under the judgment, or else the property is sold to realize it, and there are similar proceedings as in partition respecting the ascertainment and protection of lienors.

CHAPTER XIII.

PARTICULAR ACTIONS, WITH SPECIAL REGULATIONS.

2. *Replevin; Matrimonial Actions; Corporations and Joint-Stock Associations, Etc.*

376. **Replevin.**— The action to recover a chattel is the successor of the old common-law action of replevin, a summary of the history of which may be found in *Manning v. Keenan*, 73 N. Y. 45.

The test of the right to bring the action is the right to possession of the chattel. (*Wood v. Orser*, 25 N. Y. 348.)

The owner, of course, may always bring the action unless his right to possession is suspended, and also any person having a temporary or special property in the chattel which entitles him to possession, such as a lienor or bailee.

The right of possession may be invaded either by a wrongful taking or a wrongful detention. In the latter case the right of action may depend upon a demand and refusal, in which case care should be taken to make the demand prior to the commencement of the action, and to plead the demand and refusal in the complaint. (*Goodwin v. Wertheimer*, 99 N. Y. 149; *Scofield v. Whitelegge*, 49 N. Y. 259.)

The statute prevents the use of replevin in certain cases where the chattels sought have been seized under conflicting process, namely:

1. Where the chattel has been taken under a tax warrant, unless upon a claim of defective process or unlawful detention.

2. Where the chattel has been taken under a warrant of attachment against plaintiff's property, unless it is claimed to be exempt.

3. Where the chattel has been taken under execution

against property of a person other than plaintiff, and at the time of the commencement of the action the plaintiff had not the right to reduce it into his possession. (§ 1690.)

The object of this action is the recovery of specific chattels, and not the recovery of money, although, incidentally to the main relief, the plaintiff may recover damages either for the value of the chattel, if it cannot be delivered, or for any injury to it, or for both.

Where the goods of a plaintiff have been wrongfully taken or detained from him, he usually has his choice of two remedies — either to prosecute an action of replevin, now under discussion, or an action to recover damages for conversion or trover.

These actions rest upon directly opposite theories. The theory upon which an action of replevin is brought, upon such facts, is that the goods are still the plaintiff's, and that the title thereto is in him; while the theory of conversion or trover is that the title to the goods has gone out of the plaintiff, and he seeks their value in money and a judgment therefor against the person who has the goods.

The principle of the election of remedies applied in such case is that where a party has a choice of inconsistent remedies, and makes it, he is concluded by his choice. (*Fowler v. Bowery Savings Bank*, 113 N. Y. 450.)

So, when a party has a choice between replevin and trover, and selects one remedy, he cannot afterward abandon it and choose the other, unless the first action has been entirely ineffective either in advantage to the plaintiff or detriment to the defendant. (*Equitable Foundry Co. v. Hersee*, 103 N. Y. 25; *Hays v. Midas*, 104 N. Y. 602.)

Replevin is commenced like any other action, by the service of a summons.

The differences between it and other actions are in the character of the relief demanded and in the right of taking the property pending the action through the provisional proceedings hereafter mentioned.

There are provisions for abbreviated allegations in plead-

ing, for instance that simple statements of ownership and wrongful taking shall be sufficient. (§§ 1720-1721.)

The defendant may defend either upon his own title or that of a third person. (§ 1723; *Griffin v. Long Island R. R. Co.*, 101 N. Y. 348.)

The judgment in replevin should be in the alternative, for the delivery of the property to the person adjudged entitled, or the recovery of its value; and, in either case, the amount of damages, if any, for detention or injury.

It is irregular in this action to enter an ordinary money judgment. The money value should only be recovered as an alternative to the delivery of the chattel.

The execution follows the judgment, and must require delivery of the chattel to the person entitled, or, if it cannot be found, then against property in general, for the ascertained value of the chattel. (§ 1731.)

377. Replevin pending the action.— Thus far, has been considered the outline of the action itself, without reference to the summary remedy which the plaintiff may in such actions employ, and which is in the nature of a provisional remedy, although not so called. This incidental remedy may be employed either before or after the service of the summons. The only papers used are an affidavit and undertaking. The plaintiff's attorney annexes to or indorses upon this affidavit a requisition addressed to the sheriff directing him to replevy the chattel described therein. This requisition is deemed the mandate of the court. (§ 1694.)

The contents of this affidavit are prescribed in section 1695. They are:

1. The ownership of the plaintiff in the chattel; or facts showing his special property.
2. Wrongful detention by defendant.
3. The alleged cause of detention.
4. That it was not taken under a tax warrant; or that such taking was unlawful.
5. That it was not seized under execution or attachment

against plaintiff; or that if so taken, a claim of exemption was made.

6. Its actual value.

The affidavit only protects the sheriff in taking the property which is specified in it. For this reason the description should be particular and exact and such that there will be no difficulty in identifying the chattel or goods. (§ 1697.)

The undertaking must be executed by two sureties, and must be approved by the sheriff. It must be to the effect that the sureties are bound in a sum not less than twice the value of the chattels, for the prosecution of the action; for the return of the chattel to the defendant, if that be awarded; and for the payment to the defendant of any judgment recovered by him. (§ 1699.)

The replevy is made by the sheriff taking possession of the chattel if he find it in the possession of the defendant or his agent. He has no authority to take it from a third person not a party. (*Otis v. Williams*, 70 N. Y. 208; *Stimpson v. Reynolds*, 14 Barb. 506.)

Service of the papers must also be made, either personally, or in the other methods sanctioned in section 1700.

The sheriff may, to make the replevy, if necessary, break and enter buildings or inclosures. (§ 1701.)

The sheriff is required to keep the property replevied, until it becomes his duty to deliver it either to one party or the other according to the situation developed by the proceedings now to be considered.

The defendant may either require a justification of the plaintiff's sureties, or may reclaim the chattel, or may do nothing.

If he requires a justification, he must serve a notice of exception to the plaintiff's sureties, on the sheriff, and within ten days thereafter the sureties must justify. (§ 1703.)

He takes this course if he does not care to reclaim the goods, but wants to make sure that he is well secured.

If he desires, however, to reclaim the goods, he does not except to the plaintiff's undertaking, but institutes a sort of

cross-replevin proceeding upon his own account, by serving a notice, affidavit, and undertaking on the sheriff, within three days after the goods have been taken. These papers are similar to, though briefer than, those required of the plaintiff. The defendant with his undertaking must give notice of justification of his sureties. (§ 1704.)

If the defendant reclaims and justifies his sureties, the sheriff must then return him the goods. If no reclamation be made, and the plaintiff justify *his* sureties, or justification be waived, the sheriff must deliver the goods to the plaintiff. If no reclamation be made, but the plaintiff's sureties fail to justify after exception, then too the goods are returned to the defendant. Whichever party gets the goods, the other gets the bond, and so the rights of both are protected. (§§ 1706-1708.)

While the goods are in the sheriff's possession, if a claim thereto be made by a third party adversely to the defendant, the sheriff is entitled to exact indemnity, failing which he may deliver the goods to the claimant. (§§ 1709-1711.)

The Matrimonial Actions.

378. Under New York procedure these actions are:

1. To annul a marriage;
2. For a divorce;
3. For a separation.

379. The action to annul a marriage proceeds upon the theory that no valid contract was ever made, and that the alleged marriage was a mere form without legal substance. The grounds upon which an annulment will be adjudged are, generally speaking, such as are recognized everywhere.

It is necessary to a valid marriage that the parties shall be old enough to make the contract; that they shall not be mentally or physically incapacitated; that they shall be free from previous marital relations, and shall not be influenced by force or fraud.

A lapse in either of these essentials will render the mar-

riage void *ab initio* when so declared by a court of competent jurisdiction.

The age of capacity to contract marriage at common law was fourteen for males and twelve for females, but as lately as 1887 a statute was passed in New York changing the age of competence to eighteen and sixteen years, respectively. Between sixteen and eighteen a valid contract of marriage may be made by the woman, with the consent of her father, mother, or guardian, but not without. (Laws 1887, chap. 22; Domestic Relations Law, 1896; Penal Code, § 282; Code Civ. Proc., §§ 1742-1743.)

Where the action is brought because one of the parties had not attained the age of consent, it may be maintained by the infant, or the parent or guardian; but if one party be of competent age, and the other under that age, the former may not bring the action, nor in any event may the action be maintained where there is free cohabitation after the age of consent has been reached. (§ 1744.)

The action to annul because of a prior marriage in existence may be brought by either of the parties during the lifetime of the other, or by the former husband or wife. Provision is made in such case to legitimize the issue of innocent party. (§ 1745.)

Idiocy or lunacy of either of the parties to the marriage is a ground for its dissolution, and either party, or an interested relative, may bring the action. A lunatic restored to soundness of mind likewise may bring the action, provided there has been no voluntary cohabitation since the restoration. (§§ 1746-1747.)

Fraud or duress are grounds upon which the innocent party, or his or her parent or guardian, during the lifetime of the guilty party, may procure a judgment of annulment, provided, as in the other cases, there has been no voluntary cohabitation after the removal of the duress, or discovery of the fraud. (§ 1750.)

An annulment for impotency may be procured only at the suit of the injured party against the incapacitated one, pro-

vided that the action be commenced within two years after the marriage. (§ 1752.)

There is no such thing as procuring a judgment of annulment by default or upon consent or confession. Complete proof of the plaintiff's case is necessary, and excepting in the case of alleged impotency, a jury trial is a matter of right. (§ 1753.)

There are special directions concerning the appointment of a guardian for an incompetent party in section 1755.

380. The action for divorce.— The action for annulment, already considered, is based on the theory that no valid marriage between the parties ever existed. That for divorce is based on the theory that a valid marriage is in existence, which should be dissolved. The policy of the different States concerning this action varies widely. That of New York is to permit an absolute divorce upon a single ground — that of adultery — and not always, as we shall observe, for that.

It is the further policy of the New York law to permit its courts to take cognizance of these actions only where some of the essential occurrences necessary to make up a complete cause of action, took place within the State, or where the residence of one or both of the parties was within the jurisdiction at certain periods. Jurisdiction is confined to these cases:

1. Where both parties were residents at the time of the offense.

2. Where the marriage was within the State.

3. Where the plaintiff was a resident at the time of the offense and at the commencement of the action.

4. Where the offense was committed in the State and the plaintiff was a resident at the commencement of the action. (§ 1756.)

A married woman dwelling in the State is deemed a resident notwithstanding her husband's residence elsewhere. (§ 1768.)

Notwithstanding facts showing jurisdiction and defendant's adultery, the plaintiff is not entitled to judgment where any of the following facts are shown:

1. Procurement or connivance.
2. Forgiveness (express or implied).
3. That five years have elapsed before commencement of action, since the discovery of the offense.
4. Adultery of the plaintiff. (§ 1758.)

Rule 73 requires proof on the part of the plaintiff negating procurement, forgiveness, and discovery within five years, and the better practice is to insert allegations to this effect in the complaint.

The complaint should also allege the marriage, and facts showing jurisdiction. The adultery of the defendant should be stated with reasonable certainty, so that the defendant can identify the offense charged. (*Cardwell v. Cardwell*, 12 Hun, 92; *Tim v. Tim*, 16 Abb. Pr. N. S. 39; *Mitchell v. Mitchell*, 61 N. Y. 398.)

If the defendant default in appearing or answering, it does not excuse the plaintiff from making complete proof of his cause of action, and of all the matters required to be alleged in his complaint.

In cases of default the statute permits proofs to be taken, if the court so direct, before a referee, but it is usual to take such proofs in open court and to dispense with references, and in the county of New York such is the practice by local rule.

If a defendant desires to contest the suit he must follow the usual practice of putting in an answer, which he is not required to verify.

If issues are raised by answer they are triable by jury as matter of right, upon demand of either party, or by direction of the court.

In either case issues are framed and tried before a jury by the method already considered in the chapter on Trials.

If the parties consent, the case may be referred, but the court must name the referee. (§ 1757; Rules 73-77.)

A counterclaim may be pleaded by defendant in actions either for divorce or separation.

Under this it is held that where the action is for separa-

tion, the defendant may plead plaintiff's adultery and counterclaim for a divorce. (*Van Benthuyssen v. Van Benthuyssen*, 17 St. Rep. 978.)

Sections 1759 and 1760 contain special regulations respectively relating to suits by the wife, and by the husband:

As to the former:

1. Providing for legitimacy of children born or begotten prior to the action.

2. Providing for support of wife and children.

3. Cutting off husband's claims in wife's estate.

4. Preserving plaintiff's dower rights.

As to the latter:

1. Providing for legitimacy of any child born or begotten prior to the offense charged; but permitting the trial of the legitimacy of any other child. It may be remarked, in passing, that absolute nonintercourse of the husband and wife must be proved before the illegitimacy of a child will be decreed.

2. Preserving rights in defendant's property.

3. Cutting off defendant's rights in plaintiff's property.

Provision is made by a recent amendment to section 1757 for making a corespondent a party, and permitting him to defend.

The plaintiff, if successful, is permitted to remarry after a divorce, and the defendant is prohibited from remarrying during plaintiff's lifetime, but the court may in such case thereafter permit defendant's remarriage on proof of plaintiff's remarriage and uniform good conduct of the defendant for five years after the decree. (§ 1761, Laws 1897, chap. 452.)

This prohibition of marriage by a defendant after divorce has no extra-territorial effect, and a marriage contracted by the guilty party in another State is not void. (*Van Voorhis v. Brintnall*, 86 N. Y. 18.)

Nor is such a marriage a contempt of court. (*Thorp v. Thorp*, 90 N. Y. 602.)

By recent amendment, a judgment in an action to annul

a marriage for a divorce shall not be granted until three months after the filing of the decision or report. (§ 1774.)

381. Action for judicial separation.— This action is for the purpose neither of adjudging the marriage void, nor for dissolving it. The judgment preserves the marriage, but separates the parties and provides for their living apart.

The causes for which such an action may be brought are enumerated in section 1762. They are:

1. Cruel and inhuman treatment.
2. Such conduct on defendant's part as may render it unsafe and improper for him or her to cohabit with the plaintiff. These causes are invariably blended.
3. Abandonment.
4. Where the wife is plaintiff, neglect or refusal to provide for her.

In this action, as in that of divorce, there must be some local element of jurisdiction.

These limitations are prescribed in section 1763, and are:

1. Both parties must be resident at commencement of the action; or
2. The marriage must have been within the State, and plaintiff a resident at commencement of action; or
3. If the marriage was out of the State, both of the parties have since resided at least a year in the State, and the plaintiff is a resident at commencement of action.

The complaint in this action, as in that of divorce, must allege particulars. (§ 1764.) And the answer may plead plaintiff's misconduct either as a defense or counterclaim. (*Waltermire v. Waltermire*, 110 N. Y. 183.)

382. Alimony.— During the pendency of an action either for divorce or separation, the court is given power to require the husband to furnish funds for the support of herself and children, and to pay her expenses of the litigation. This power may be exercised, and often is, whether the wife be plaintiff or defendant. (§ 1769.)

The power to award alimony is dependent upon the marriage relation, and, consequently, if that relationship be

denied, and not sustained by a reasonable amount of proof, alimony will be denied.

The application for temporary alimony and counsel fees is made upon motion, and determined either upon affidavits or upon testimony taken before a referee.

Permanent alimony is fixed and granted by the judgment, where the wife is successful, and is fixed in proportion to the husband's income.

To enforce payment of either temporary or permanent alimony the court has power to exact security, or to sequester property through a receiver (§ 1772); and may in default of obedience to an order or judgment for that purpose, punish for a contempt. (§ 1773.)

In these actions the court may also direct as to custody of children. (§ 1771.)

383. Actions relating to a corporation.—In actions by or against corporations, a general averment that it is such is, in pleading, sufficient, and no proof as to incorporation is required unless by a verified answer the defendant affirmatively alleges that the party suing or sued as such is not a corporation. (§§ 1775, 1776.)

A mistake in the name is waived, unless misnomer be pleaded as a defense. (§ 1777.)

A corporation sued upon an instrument for the payment of money cannot get an extension of time to plead except upon notice, and must procure an order that the issues be tried and serve it with its pleading. Otherwise, plaintiff may enter judgment as for a default in pleading. (§ 1778.)

Foreign corporations may sue or be sued in the same manner as a domestic corporation with the restriction that a non-resident or foreign corporation may sue only as provided in section 1780, namely:

1. For damages for the breach of a contract made within the State, or relating to property therein:
2. To recover real or personal property in the State:
3. Where the cause of action arose within the State.

Sections 1781-1783 provide for various forms of actions against officers, trustees, or directors of corporations.

There are various methods under the Code through which the property of a corporation may be reached and applied to the payment of its debts, viz.:

1. A judgment creditor's action for sequestration under section 1784, where an execution against its property has been returned unsatisfied.

2. An action for involuntary dissolution because of insolvency under sections 1785-1796.

3. Action by the People to annul a corporation under sections 1797-1803.

4. Proceedings for a voluntary dissolution under sections 2413-2423.

The general purpose of these proceedings is to secure the property of the corporation first, for payment of its debts, and next for distribution among its stockholders.

384. Unincorporated associations.—There are many such — some of very large membership, as the Stock Exchange and some of the Express Companies — organized for business purposes, and many others for social or benevolent purposes. Such associations possess joint rights and have the burden of joint obligations. They are, in many respects, large partnerships, and were it not for a statutory provision, originally enacted in 1849 and now incorporated in sections 1919 to 1924 of the Code, whenever it became necessary for such an association to sue, all of the members would have to be made plaintiffs; and whenever it was desired to put a claim in suit against such an association, it would be necessary to ascertain its membership, and join all as defendants.

But section 1919 permits, in such cases, provided only that the association shall consist of seven or more members, an action to be maintained in favor of or against the association, in the name of its president or treasurer.

In such case a choice exists, either to sue all the membership, without reference to the statute, or to sue the asso-

ciation in the name of its president or treasurer. If the latter course be adopted, a plaintiff must exhaust his remedy against the joint property of the association before resorting to the property of one of the individuals composing it. If he so exhaust his remedy, he is at liberty to sue the individual members. (*Ebbinghousen v. Worth Club*, 4 Abb. N. C. 300 and note; *Hudson v. Spaulding*, 25 St. Rep. 256.)

385. Joint debtors.—In an action against joint debtors, one only may be served, and a judgment obtained in form against all; but such judgment may be enforced by execution only against the property of the one served and against the *joint* property only of all. If it is desired to reach individual property of those not served, a new action must be commenced against them. (§§ 1932–1941.)

At common law, if a creditor released to one of several joint debtors, he discharged all.

Section 1942, which re-enacts a statute of 1838, permits a compromise with one of several joint debtors, without discharging the rest. In this case a written instrument of exoneration must be executed to the debtor with whom the compromise is made; but, as a matter of public policy, the statute will not permit one of several partners to make a separate composition for a partnership debt, unless the partnership has been dissolved. (§ 1944.)

386. Actions against executors and administrators.—General provisions are contained in sections 1814–1835.

But one of such actions requires any special remark.

In section 2718 a provision of the old Revised Statutes is re-enacted. Under this statute an executor or administrator may, at any time after the issuance of his letters, publish in a newspaper, a notice for claims against the estate represented by him. For this publication he obtains authority by a surrogate's order which is issued as a matter of course. The notice is published once a week for six months, and requires all persons having claims against the deceased, to present the same, with vouchers, to such executor or administrator, at his designated place of business, at or before

a certain date, which must be at least six months from the day of first publication.

The purpose of this notice is to enable the executor to close up the business of the estate and distribute the proceeds among the persons entitled, as speedily as possible.

Claims presented pursuant to this notice should be verified by the affidavit of the claimant that the claim is justly due, that no payments have been made thereon, and that there are no offsets against the same to the knowledge of the claimant. If the claim be accepted by the executor or administrator, it is paid, in full or *pro rata* according as the assets of the decedent are sufficient or insufficient to discharge all the claims of creditors. If the claim be rejected, the claimant may offer to refer it by a notice in writing. A written agreement between claimant and the executor is then made, upon which an order of reference is made. Thereupon the proceedings are the same as in an ordinary action where a reference is made to hear and determine. Judgment is entered directly upon the referee's report.

Proceedings to collect rejected claims must be commenced within six months after the rejection, either through the means of this reference, or by an ordinary action; otherwise the claim is barred. (§ 1822.)

There is a statutory pressure upon claimants to refer their claims, for it is only upon a refusal by the executor or administrator to refer that the claimant is permitted to recover any costs. (§ 1836.)

There is no absolute obligation on the part of executors or administrators to advertise for claims. The notice is for their protection, and they are at liberty to waive this protection. (*Fliess v. Buckley*, 90 N. Y. 286.)

The effect of a failure by a claimant to present his claim to the executor in answer to the advertisement is not to cut off the claim altogether. He may at any time afterward present it to the executor or administrator, and if any assets remain in the representative's hands, the representative is liable to the claimant to the extent of such assets; but, if

the assets have been distributed, the advertisement then protects the executor or administrator, and the claimant is relegated to his remedy of an action against the next of kin or legatees, to recover against them, to the extent of the amounts paid or distributed to them, for the amount of the claim. (§§ 1837-1842.)

And in like manner, the heirs or devisees of a decedent may be held liable for debts to the extent of their interest in the real property which came to them respectively through the death of the decedent. (§§ 1843-1854.)

The action provided for in the sections last quoted must not be confused with the special proceeding for the sale of a decedent's land to pay debts, provided in the chapter on Surrogates' Courts.

CHAPTER XIX.

PROCEEDINGS IN REVIEW.

387. General considerations.—A very considerable part of the law of procedure is made up of provisions for the correction of errors.

As a matter of public policy, the importance of a system for the correction of the errors of courts cannot be overestimated. Should judicial decrees of trial courts be freed from supervisory control, confusion and tyranny would be distinguishable among a crowd of evil results.

It is impossible to prevent error from creeping into the administration of justice. The parties themselves make mistakes, judges make mistakes and juries make mistakes. These mistakes may lead to erroneous, injurious, and unjust results.

In the systems of procedure of all English-speaking states and nations there are two general methods of review, through which errors are corrected; one is, by a corrective motion in the same court in which the alleged error occurred; the other, by an appeal to a supervisory or appellate court; and it is a general principle of practice that the court of original jurisdiction shall always be given the opportunity to correct its own errors before an appellate tribunal is asked to correct them. An attorney is not permitted to accumulate points of error at a trial, and say nothing about them, with the purpose of overturning an adverse judgment. All points and questions must be fairly and clearly presented for ruling to the trial court.

For errors at a jury trial, the methods of correction are:
1. By motion for a new trial. 2. By appeal. And these methods are, usually, consecutively employed.

388. Motions for a new trial.—Upon a trial before a court and jury, the respective parties, through their attor-

neys, present their pleadings and produce the evidence in support of their respective contentions. The presiding judge passes upon all questions of law which arise during the course of the trial, upon the pleadings, upon the production of evidence, and upon the instruction of the jury.

The judge is constantly, during the course of a trial, called upon to decide questions arising upon the incidental motions and objections, in behalf of the respective parties. He must, in passing upon such questions, either grant or deny motions, exclude or admit testimony, and sustain or overrule objections. In each instance the ruling is against one party or the other, and the party against whom each ruling is made, may reserve his rights for subsequent review by means of an oral exception noted on the minutes.

The function of the jury is simple and exclusive. It is to decide upon such disputed questions of fact as are submitted to them, upon the evidence.

Of the evidence, proceedings, rulings, and exceptions taken and had at the trial, minutes are kept by the judge assisted by the stenographer.

In each of the steps in a trial which have been mentioned there is room for error. The judge may make an error in one or more of his rulings, and any such error, when exception has been noted, is subject to review. The jury also may err in its decision of fact, but this error is reviewable only within very narrow limits. The verdict of the jury, if they decide within the evidence, is conclusive upon questions of fact; but when their finding is obviously unsupported by evidence, or against the evidence, it may be set aside, and in such case it is the duty of the judge presiding at the trial, upon application for that purpose, to set aside the verdict and order a new trial. This is the extent of the power and duty of a trial judge over a verdict by a jury; and, if this power, in a proper case, be invoked and its exercise refused, an error is committed which is the subject of exception and review.

At the close of a jury trial, after the rendition of a ver-

dict, it is the right of the defeated party promptly to move for a new trial, upon the exceptions taken at the trial, or because the verdict is for excessive or insufficient damages, or otherwise contrary to the evidence or contrary to law. As all of the facts of the trial surrounding the alleged errors are within the knowledge of the judge who presided, his own minutes furnish a sufficient aid to his recollection, to put him in possession of all that he should know in order to determine the motion. This is the motion for a new trial which is that commonly made at a jury trial, and is the subject of section 999. It is made without any papers being required, "upon the minutes of the judge," and must be made at the same term, in which the trial was had.

Thus it is, that if a judge presiding at a jury trial concludes that in the course of its proceedings he has, in any of his rulings or instructions, committed an error prejudicial to the party against whom the verdict has gone, he has the power to order a new trial because of his own error; or, if in his judgment the jury have gone outside the bounds of their duty, by finding a verdict unsupported by or against evidence, he may, likewise, order a new trial.

The question as to whether a verdict ought to be set aside as against the weight of evidence, is one not governed by any well-defined rules. The court is authorized to set aside the verdict not only where it is against all the evidence, but when it is so clearly and plainly against the weight of evidence as to show that the jury were mistaken or influenced by prejudice, passion, or some other similar motive. (*Corning v. Troy*, 44 N. Y. 577.)

It is not enough to justify a new trial, that the judge differs in opinion with the jury.

When the evidence on material points is conflicting, the court is bound to deny the motion. (*Beckwith v. N. Y. Central R. R. Co.*, 64 Barb. 299; *Swartout v. Willingham*, 6 Misc. 179.)

For instances of cases where the verdict was held to be against evidence reference may be made to *Clinton Bank v.*

Collignan, 83 Hun, 467; *Russell v. N. Y. C. & H. R. R. Co.*, 12 App. Div. 160; *Suhrada v. Third Ave. R. R. Co.*, 14 App. Div. 361.

In order to set aside a verdict on the ground of excessive damages, the sum recovered must strike the mind as being extravagant, and, under the circumstances of the case, unwarranted. (*Tisdale v. Del. & Hud. Canal Co.*, 4 St. Rep. 812.)

The cases in which verdicts have been subjected to examination and criticism, as excessive are hundreds in number, and no general principle other than that above expressed can be extracted.

To bring up for review by an appellate court the matters determined by a trial judge upon a motion for a new trial on the minutes, an order must be made denying or granting the motion, and an appeal taken from the order, which should recite the precise ground upon which the motion was made. (*Pharis v. Gere*, 107 N. Y. 231.)

389. Motions for a new trial, upon grounds outside the record.—The motion considered in the last preceding paragraph is that which is made because of some error which appears on the face of the proceedings as disclosed upon the record of the trial contained in the judge's minutes.

A motion for a new trial of an entirely different character may be made upon grounds which the record does not disclose. The commonest examples of such a motion are on the grounds of surprise; newly discovered evidence; or misconduct of or concerning the jury.

The practice upon these motions differs from that in the motion already described, in two important particulars: 1. It is not made before the trial court, but before the part of the court which usually hears motions—the Special Term; and 2. It is made upon a “case” (hereafter explained) containing proofs of what took place on the trial itself, as well as of the outside matters upon which the motion is based. (§ 1002.)

Surprise.—A motion for a new trial on the ground of

surprise may be made where something has occurred in the course of a trial which the moving party had no reason to expect, and which, without any fault or omission on his part, he found himself unprepared to meet, and against which he could not, with due diligence, have made preparation, and which has resulted in an injustice to him. The "surprise" which will sustain such a motion must be with reference to a matter of fact, and not concerning a question of law. (*Matter of Ramsdell*, 20 St. Rep. 446; *Giraudat v. Korn*, 8 Daly, 406; *Helwig v. Second Ave. R. R. Co.*, 9 Misc. 61.)

Newly discovered evidence.—The court has power to grant new trials upon the ground that the unsuccessful party has, since the trial, discovered new evidence in his favor, but it is a power which is cautiously and sparingly exercised.

Upon such a motion, the moving party must show, in his affidavits, what the evidence is, that it was discovered since the trial, and could not have been before, with reasonable diligence, that it is not cumulative, and is of such a nature that had it been produced at the trial a different result would have been likely. (*Glassford v. Lewis*, 82 Hun, 46.)

Misconduct of or concerning the jury affords ground for a new trial when established by satisfactory evidence. (*Patrick v. Victor Knitting Mills Co.*, 37 App. Div. 7; *Mais v. Ruh*, 57 App. Div. 15.)

390. *Exceptions.*—For the purpose of reviewing rulings made upon questions of law by courts or referees arising upon the trial of an issue of fact, a timely exception must be taken.

During a jury trial this is done orally, by counsel, and noted by the judge, whenever occasion requires, up to the time of verdict. (§ 995.) In trials of issues of fact before a court or referee exceptions are taken in the same manner until the submission of the cause for determination. After the decision by judge or referee something more is necessary. This decision, as has been seen, is required to be in writing, signed by the judge or referee, and

filed. (§§ 1021-1022.) To this formal decision in writing, within ten days after its service, exceptions must be drawn and filed by the party intending to review the decision. The general idea of such exceptions is that they shall be directed only to decisions upon questions of law, and not to determinations of fact, but a finding of fact unsupported by evidence is a ruling upon a question of law, for the purpose of exception.

The practice in drawing these exceptions is not well defined. That actually employed is for the attorney for the excepting party to draw separate exceptions to every adverse determination, whether of law or fact, which he designs to make the subject of review. (*Porter v. Smith*, 35 Hun, 118; *affd.*, 107 N. Y. 531.)

391. The case.— As a basis for all sorts of motions for new trials (excepting only when such a motion is made upon the judge's minutes, under section 999), what is known as a "case" must be made. The case consists of a narrative of so much of the proceedings of the trial as is necessary to be known in order to present the questions upon which a review is asked. Upon a trial the official record which is kept by the clerk is the barest possible outline of the proceedings. The stenographer takes in shorthand the testimony, objections, motions, and rulings during the course of the trial, but his notes are not ordinarily written out at all. If it becomes necessary for purposes of review to make a "case," his notes, when transcribed, become the material for its preparation.

The general plan of the rules and statutes in the matter of preparing and settling a case is that the attorney for the appealing or moving party prepares a proposed case which he serves upon the adverse attorney who then prepares and serves amendments, which he may desire made in the case as proposed. All matters concerning the preparation and settlement of the case upon which the attorneys cannot agree are settled and determined by the judge who presided at the trial.

After, through this process, it has been determined what the case shall include, a final and complete copy is made, certified by the judge and filed. This case when so made, settled, and filed becomes the official and complete record of the trial for all purposes of review.

The details of the practice here outlined are found in section 997 of the Code, and Rules 31, 32, 33, 34, 35, and 41. (See also *Porter v. Smith*, 107 N. Y. 531; *Rosenstein v. Fox*, 150 N. Y. 354; *Schwarz v. Weber*, 103 N. Y. 658.)

392. Appeal — General principles.—An appeal when allowed by law is taken from the determination of a lower court to a higher court or to a higher branch of the same court. The general rule is that every judgment or order involving a substantial right may be appealed from, but this rule is subject to some restrictions: for instance, a party who allows a judgment or order to be taken against him by default cannot appeal from such a judgment or order. His remedy in such case is to move to open his default, and if his application be denied, then to appeal from the order denying it. (§ 1294, Code; *Hawkins v. Smith*, 91 Hun, 299.)

Then, also, the right to appeal, like any other right which is not inalienable, may be waived, and such a waiver is worked by the acceptance of any benefit under the judgment or order appealed from.

Under Code practice the party appealing is called the appellant, and the adverse party the respondent. Otherwise the title of the action remains the same, except that after an appeal has been taken to a higher court, the name of that court is substituted in the title. (§ 1295.)

393. Notice of appeal.—The first and most important step in the proceedings on appeal is to serve this notice, to the effect that the appellant appeals from the judgment or order, or from a specified part thereof, upon the adverse attorney. A duplicate of this notice is required to be filed in the office of the clerk in whose office the judgment or order is entered. (§ 1300.)

After the step of service of notice of appeal has been taken, if a defect or error occur in the subsequent proceedings it may be supplied or amended by permission of the court, but the court has no power to extend the time to serve this notice, or to permit an appeal to be taken after the statutory time to serve the notice has expired.

The time limited for the service of notice of appeal from an order or judgment to the Appellate Division of the Supreme Court is thirty days after service of a copy of the judgment or order appealed from with written notice of the entry thereof. (§ 1351.)

The time to appeal does not begin to run until after this service, and after the prescribed period of thirty days after such service has run without service of the notice of appeal, the right to appeal has gone beyond recovery.

As the effect of service of judgment with notice of entry has such an absolute effect upon the right to appeal, the party making the service is held to the strictest technical practice in all details.

So, a notice not indorsed or subscribed both with the name of the attorney and his office address is ineffectual to limit the time for appealing; and a copy which lacks the attestation to the judgment is likewise insufficient. (*Kelly v. Sheehan*, 76 N. Y. 325; *Kilmer v. Hathorn*, 78 N. Y. 228; *Good v. Daland*, 119 N. Y. 153; *Livingston v. N. Y. El. R. R. Co.*, 60 Hun, 473.)

If, however, the notice of appeal is served either on the attorney, or the county clerk, with an omission to serve the one or the other, section 1303 gives the court power, upon good cause shown, to permit the omission to be supplied.

394. Security on appeal — Stay of proceedings.—To perfect an appeal (excepting an appeal to the Court of Appeals) security is not necessary, but an appeal taken without giving security will not stay proceedings under the judgment or order appealed from. To accomplish a stay, an undertaking must be given, in form depending upon the character of the judgment appealed from.

As to the character of an undertaking to stay proceedings, see sections 1327-1335.

395. Outline of proceedings on appeal.—After service of notice of appeal, and of the undertaking, if one be given, the next step is the preparation and settlement, and filing of the case. Then the certifying and transmission of a copy of the record to the clerk of the appellate court. (§§ 1315 and 1353.) The expense of certification is usually avoided by the parties' stipulation. The record and points of argument are then printed, the case put upon the calendar of the appellate tribunal, noticed for argument, and heard in due course; the determination announced, after deliberation, and embodied in an order of the appellate tribunal, upon which a judgment is entered according to its direction, in the court below. (Code, chapter XII; Rules 39, 40, 41, 46.)

CHAPTER XV.

THE COURTS OF NEW YORK STATE AND THE OUTLINES OF THEIR JURISDICTION.

396. **The supreme court.**— This is the only court of general original jurisdiction in law and in equity. Its authority and process run throughout the State, and it has cognizance of all actions and proceedings formerly cognizable by the courts of common law and of chancery. Although the State is divided into judicial districts, in each of which justices of this court are elected, they are, when elected and commissioned, State officials qualified to act throughout the State.

For the purpose of administration of business in this court an action or proceeding is conducted in some particular county, subject to the power of the court to change, under the rules already mentioned.

This court has jurisdiction to act in the smallest causes as well as the largest, but, as a restriction upon bringing actions to recover small sums in any but the courts of inferior jurisdiction provided for that purpose, the provision is made in sections 3228-3229 as to costs, generally to the effect that in actions of tort where the recovery is less than fifty dollars, the costs cannot exceed the damages, while in actions on contract if the recovery be less than fifty dollars, costs are awarded against the plaintiff.

The general provisions as to the jurisdiction and organization of this court are to be found in section 1 of article VI of the State Constitution, and section 217 *et seq.* of the Code.

There formerly existed in the larger cities of the State, courts having a general jurisdiction closely concurrent with that of the Supreme Court. These courts, consisting of the Superior Court of the City of New York, the Court of Common Pleas for the City and County of New York, the Su-

perior Court of the City of Buffalo, and the City Court of Brooklyn. These courts were abolished in 1896 and their judges transferred into the Supreme Court. (Const., art. VI, § 5.)

397. The County Courts, one of which is constituted in each county of the State excepting New York county, may be described as courts of restricted general jurisdiction. Their jurisdiction is concurrent with that of the Supreme Court in actions for partition, dower, foreclosure, or specific performance affecting lands in the particular county in which the action is brought, and is also concurrent in proceedings relating to the care of the persons and property of incompetents. In ordinary cases their jurisdiction is confined to personal actions at law in which all of the defendants reside in the county in which the action is brought and in which the recovery sought does not exceed two thousand dollars. (Const., art. VI, § 14; Code, §§ 340 *et seq.*; *Weidman v. Sibley*, 16 App. Div. 616.)

The process and mandates of a County Court in cases in which it has jurisdiction run throughout the State. (Code, § 347.)

398. The City Court of New York is a court of limited and local jurisdiction. It has, with respect to subject-matter, jurisdiction of personal actions at law, where the amount demanded does not exceed two thousand dollars, and a very limited jurisdiction, in equity, to foreclose mechanics' liens, or liens on chattels.

It has a peculiar jurisdiction of claims by merchant seamen either in contract or tort, unlimited as to amount. This last-mentioned element of jurisdiction has been continued from that of the former court, to which the present court is the successor. The former court was named the Marine Court of the City of New York.

The mandates of this court can only be executed within the limits of the old city of New York as it existed prior to the consolidation of the adjacent boroughs on January 1, 1898, excepting that service of subpoenas may be made in adjacent counties, and its contempt process runs throughout

the State. Special regulations are made as to practice in this court. (§§ 315-339 and 3159-3194, Code.)

399. The Municipal Court of the City of New York is a court of special, limited, and local jurisdiction.

Speaking generally its jurisdiction is confined to personal actions at law where the amount claimed does not exceed five hundred dollars. Its process and mandates run to any part of the enlarged city of New York. The Municipal Court Act (Laws 1902, chap. 580) provides for its organization and the details of its practice.

400. Courts of justices of the peace are established in each county excepting New York county. They are courts of special, limited, and local jurisdiction, confined, generally speaking, to personal actions at law where the amount claimed does not exceed two hundred dollars.

Special provisions as to their jurisdiction and practice are contained in chapter XIX, sections 2861-3158, Code.

401. Other special and local courts.—As to Court of Claims see Code, §§ 263-280; Surrogates' Courts, chapter XVIII, Code; Local Municipal Courts, §§ 3196-3227; and the enumeration in §§ 2 and 3; and as to criminal jurisdiction see § 11, Code Criminal Procedure.

402. Appellate Division of the Supreme Court.—This is the Court of general, appellate jurisdiction, upon appeals from determinations of the tribunals of first instance, whether in the Supreme Court, or in the other courts above mentioned. As to some matters its determinations are subject to a further review upon an appeal to the Court of Appeals; as to others it is the court of last resort. Its organization is in four departments, and its judges are detailed from the general body of Supreme Court justices. (See §§ 219, 220 and 1340-1361, Code.)

403. The Court of Appeals is the court of last resort in the State, and is a court of limited appellate jurisdiction. (See Const., art. VI, §§ 7-9; §§ 190-203 and 1324-1339, Code.)

It reviews determinations of the Appellate Division on appeals from final judgments or orders, or upon certified questions; with the restrictions specified in section 191.

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